88-1380

No. _____

FEB 17 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE OGLALA SIOUX TRIBE and
THE ROSEBUD SIOUX TRIBE,
Petitioners,

v.

THE UNITED STATES and
THE SIOUX TRIBE OF INDIANS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1) Whether the federal courts may permit attorneys to prosecute claims in behalf of Indian tribes with whom they have no attorney-client relationship, no statutorily-required attorney contract and with whom the attorneys are in conflict.

2) Whether the federal courts may permit attorneys to settle Indian claims without notice to or consent of the attorneys' purported Indian clients, notwithstanding the federal law and rules of professional ethics requiring actual client consent to settlement of claims.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Oglala Sioux Tribe and Rosebud Sioux Tribe and the respondent The United States.

Another respondent is "The Sioux Tribe of Indians", whose actual members or representatives are uncertain at this time. In this case, the eight claimant Sioux tribes, including petitioners, were collectively called The Sioux Tribe of Indians. The Sioux Tribe of Indians is a legal fiction. The eight plaintiff tribes are the actual Indian parties. They are the two petitioners, The Standing Rock Sioux Tribe, The Cheyenne River Sioux Tribe, The Lower Brule Sioux Tribe, The Fort Peck Sioux Tribe, The Crow Creek Sioux Tribe and The Santee Sioux Tribe. In the proceedings before the Claims Court and the Federal Circuit Court of Appeals, petitioners repeatedly requested that the Courts clarify attorney-client relationships and properly align the Sioux tribes in the proceedings. Those requests were denied. Therefore, the record does not clarify which of the six other Sioux tribes might be adverse parties at this time.

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v.

THE UNITED STATES and
THE SIOUX TRIBE OF INDIANS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioners The Oglala Sioux Tribe and The Rosebud Sioux Tribe respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled proceeding on November 23, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 862 F.2d 275 (Fed. Cir. 1988), and is reprinted in the appendix, p. 1a, *infra.*

The Memorandum Order of the United States Claims Court (Yock, J.) is reported at 14 Cl. Ct. 94 (1987). It is reprinted in the appendix, p. 17a, *infra.*

JURISDICTION

This proceeding was originally brought under the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* (1976). After the Claims Court entered final judgment, petitioners made a timely motion for relief from judgment pursuant to Rule 60(b). Relief was denied by the Claims Court on December 17, 1987.

On petitioners' appeal, the Federal Circuit upheld the Claims Court in a decision of November 23, 1988 by Chief Judge Friedman. Judge Newman filed a dissenting opinion. Petitioners' suggestion for rehearing en banc was declined on December 28.

The jurisdiction of this Court to review the judgment of the Federal Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

25 U.S.C. § 70n (Indian Claims Commission Act):

> Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed

10 per centum of the amount recovered in any case. The attorney or attorneys for any such tribe, band, or group as shall have been organized pursuant to section 476 of this title, shall be selected pursuant to the constitution and bylaws of such tribe, band, or group. The employment of attorneys for all other claimants shall be subject to the provisions of sections 81, 82, 83, and 84 of this title.

The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as a part of its report as provided in section 70t of this title in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 70u of this title.

25 U.S.C. § 70u (Indian Claims Commission Act):

(a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this chapter shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

25 U.S.C. § 81 (Contracts with Indian tribes or Indians):

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:
>
> First. Such agreement shall be in writing, and a duplicate of it delivered to each party.
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.
>
> Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.
>
> Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.
>
> Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

> All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

25 U.S.C. § 476 (Indian Reorganization Act):

> . . . . In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the Tribe; . . . .

STATEMENT OF THE CASE

Petitioners Oglala Sioux Tribe and Rosebud Sioux Tribe have sought to withdraw their claims, which had been filed years earlier on their behalf and on behalf of the six other Sioux tribes in this case. The two petitioner tribes constitute over half of the Sioux people who have an interest in the claims. The final judgment was an award of about $40 million.

The claims, filed in 1950 under the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* (1976), are for monetary damages only. Twelve years ago, the Oglala Sioux Tribe discharged its claims attorney and gave notice that it wanted to avoid the adverse legal consequences which the Tribe would likely suffer if its claim

were permitted to proceed to final judgment and payment. Over time, the leaders of the Oglala Sioux Tribe had come to realize that payment of the claim would threaten to extinguish its more important and valuable legal claims and interests in land recovery. 25 U.S.C. § 70u; *United States* v. *Dann*, 470 U.S. 39 (1985).

In 1982, petitioner Rosebud Sioux Tribe took similar steps to stop its claim from proceeding in this case. It, too, refused to renew its expired contract with the claims attorneys. It, too, stated on the public record that its principal legal objective is the recovery of wrongfully taken Sioux lands.

The petitioner tribes took many steps to extricate themselves from these proceedings. Their opposition to the claim was noted in several official tribal resolutions, in letters to claims counsel and the Claims Court and in other public statements.

Other Sioux tribes followed suit. By 1985, six of the eight plaintiff tribes were on record in opposition to any settlement involving only a money award. *Sioux Tribe of Indians* v. *United States*, 8 Cl. Ct. 80, 86-89 (1985). The dissent below reviews some of this history of Sioux opposition to settlement and concludes (p. 14a, *infra.*):

> [T]he United States as well as the Claims Court had full knowledge, throughout the past several years of these proceedings, that most of the principals objected to the negotiations and to the purported settlement.

See, also, p. 14a at n.1 and p. 15a at n.2.

The affidavits submitted by petitioners in the proceedings below recount in greater detail the history of their efforts to withdraw from this case. See the Joint Appendix below, pp. 109-164. Respondents did not submit any affidavits in opposition, and they have not contested any of the salient facts.

The attorneys discharged by petitioners continued to press forward with the claims even though the attorneys

were in conflict with both the petitioner Sioux Tribes and, it appears, with some of the other six plaintiff Sioux tribes. The lead attorney consistently noted his appearance as counsel of record for all of the eight plaintiff tribes who were collectively known as "The Sioux Tribe of Indians" in this case.

In 1980 and 1985 the lead claims attorney filed a motion to withdraw "temporarily" as counsel for the Oglala Sioux Tribe and Cheyenne River Tribe because of the conflict between the Sioux tribes. He took no appeal, however, from the Claims Court's denials, and he continued to pursue the monetary claim as counsel of record for all eight Sioux tribes, even though he was representing the interests of some of them against the interests of petitioners and others. The attorneys state that by the time of the contested settlement they had attorneys contracts with only three of the Sioux tribes representing only a small fraction of the Sioux people. See the Statement and Brief of the Attorney of Record and Other Contract Attorneys in Support of Motion for Attorneys' Fees, pp. 4-10 (Aug. 27, 1987). It appears that only two of the plaintiff tribes, The Crow Creek Sioux Tribe and The Lower Brule Sioux Tribe, have attorneys' contracts with claims counsel at this time.

In 1985 the Claims Court imposed a settlement to overcome the "impasse" created by the refusal of petitioners and other plaintiff tribes to accept a money award. On appeal, the Federal Circuit ruled that "the trial court could not impose upon the parties a settlement to which they had not agreed." *Cheyenne River Sioux Tribe* v. *United States*, 806 F.2d 1046, 1051 (Fed. Cir. 1986), *cert. denied*, *Oglala Sioux Tribe* v. *United States*, —— U.S. ——, 107 S.Ct. 3184 (1987).

On remand the Claims Court continued to permit the claims attorneys to act on their own, without any involvement of petitioners, and to carry the case to a final

settlement that was again imposed. Without notice to or approval of the two petitioner tribes (or, it appears, *any* of the Sioux tribes), claims counsel settled the case by entering into a stipulation of facts that was incorporated into their motion for entry of judgment made jointly with government counsel. That motion was summarily granted, and judgment incorporating the terms of the stipulation was entered by the Claims Court. See pp. 44a-49a, *infra*. Counsel made this settlement in the name of all eight Sioux tribes, including petitioners.

Upon learning of the entry of the judgment, petitioners sought legal assistance from present *pro bono* counsel. A timely motion for relief from judgment was filed on petitioners' behalf pursuant to Rule 60(b). This motion was denied by the Claims Court. On appeal, the Federal Circuit upheld the denial of relief in a split decision. A suggestion for rehearing en banc was declined.

The following aspects of the Federal Circuit's decision require emphasis:

1) The majority decision acknowledges that the petitioners and other Sioux plaintiffs did not in fact consent to the settlement. Only the attorneys were involved. The attorneys stipulated to $3.7 million in offsets against the Sioux claims. They filed a joint motion for entry of judgment incorporating that stipulation and foreclosing all appeals. See pp. 44a-49a, *infra*. This was characterized by the majority as a routine evidentiary stipulation or stipulation of facts.

The dissent finds that this was a settlement requiring client consent. The dissent points to the Federal Circuit's earlier decision prohibiting imposition of such a settlement, *Cheyenne River Sioux Tribe* v. *United States*, *supra*, and notes that that ruling does not provide (p. 13a, *infra*):

> authorization to counsel for the Sioux tribes to enter into a binding agreement with the government, or

> to achieve final judgment thereon by joint motion, contrary to express instructions of the client tribes that represent the majority of Sioux Indians. . . . It is inconceivable to me that, with over half the clientele in loud revolt, nominal counsel has the authority to bind these tribes, against their intentions and instructions.

2) The majority decision holds that claims counsel could appear as counsel for petitioners, even though representing adverse interests, because after many years of litigation "the appellant tribes were required to do something more than not renew their attorney's contracts if they wished to terminate their attorneys' authority to represent them." See p. 11a, *infra*. The "something more required" by the majority is a formal substitution of counsel in the case. The court cites no legal authority for this rule, and it does not discuss the uncontested, sworn evidence in the record which establishes that the petitioner tribes were financially unable to retain substitute ccunsel. See the Joint Appendix below, pp. 159-162.

The majority decision does not discuss the federal statutes requiring claims attorneys to have federally-approved contracts with claimant tribes. 25 U.S.C. §§ 70n, 81, 476. Petitioners argued that attorneys without such contracts are barred from representing Indian claimants in this case.

The dissent clarifies that petitioners took a number of steps to terminate the unauthorized prosecution of their claims in this case. For example, the Oglala Sioux Tribe's Vice President in 1983 formally directed the lead claims attorney to withdraw its claim, and informed him that "[y]our contract with the Oglala Sioux Tribe has terminated in 1977 and it is the position of the Oglala Sioux Tribe that you do not represent the Tribe. . . . You are directed not to take any action inconsistent with

this Resolution." Notice was also given to the Claims Court. See p. 15a at n.2, *infra*.

3) Petitioners argued below that it was necessary for the Federal Circuit to clarify attorney-client relationships and to properly align the Sioux parties. Brief for Appellants, pp. 14-17. This is required because of the open discord and adversity among the eight plaintiff Sioux tribes on the issue of a money damages settlement. The majority decision does not address this issue. Instead, it treats the eight plaintiff tribes as a single entity and finds that the elimination of the two petitioner tribes from the case "would not change the judgment in favor of the Sioux Tribe of Indians." See p. 12a, *infra*.

The dissent points out that the individual Sioux tribes are the actual plaintiffs: "The Sioux Tribe of Indians is no more than a collective name used for convenience in the case caption for these eight plaintiffs. The actual Sioux Tribe of Indians was dissolved in 1890." See p. 14a, *infra*. The judgment affects the particular rights and interests of each tribe that is a party.

4) The majority holds that a time bar prevents petitioners from withdrawing: "It is too late in the game to do this now." See p. 12a, *infra*. No time is specified, and no legal authority is cited for this rule. The Court does not discuss the fact that the Oglala Sioux Tribe had been trying to withdraw its claim for twelve years and that the Rosebud Sioux Tribe also had attempted for years to withdraw its claim from this case.

The dissent asserts that there is no time bar: "The prolonged pendency of this case does not justify the irregular procedure whereby it has been brought to an end." See p. 16a, *infra*.

5) The dissent asserts that the Court's ruling negates the attorney-client relationship, the fiduciary responsibility of the federal government to Indians and the obligation of the courts to supervise counsel (p. 16a, *infra*):

These obligations include respecting the authority of the tribes to ascertain their own best interests, and not to impose on the tribes the views of their lawyer.

6) The majority holds that the denial of relief from judgment was not an abuse of the Claims Court's discretion. The dissent calls it "plain error".

On remand, the Claims Court summarily denied petitioners' motion to file an opposition to the claims attorneys' application for attorneys' fees and expenses. Petitioners' request for a hearing on that application was also denied. At the same time, the Claims Court summarily granted claims counsels' application and awarded the maximum permissible attorneys' fees of $4,024,580.00 and all of the requested expenses of $178,619.81. These are contingent fees and expenses to be paid from the judgment award in this case. 25 U.S.C. § 70n.

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit created a discriminatory new rule that permits attorneys to usurp the right of Indian tribes to control their legal claims, and that violates federal statutes, federal policy and case law governing attorneys and Indian tribes.

The Federal Circuit's decision approves the prosecution of Indian claims by attorneys who had been discharged by the lawful authorities of the petitioner tribes, who did not have attorney contracts as required by federal statutes, and who were in open conflict with the tribes. The petitioner tribes wanted their claims withdrawn, but the attorneys, the Claims Court, some of the tribes and the government wanted the claims prosecuted and paid. The misrepresentation of petitioners by counsel was known to and approved by the Claims Court for years—over ten-years for the petitioner Oglala Sioux Tribe—and continued through settlement and final judgment.

The Claims Court and the Federal Circuit treat the lawful governing authorities of the petitioner tribes as virtual incompetents. The Claims Court explains its actions by disparaging petitioners' legislative efforts to recover land as "a pipe dream". See p. 40a, *infra*. On the basis of such reasoning, the attorneys are authorized to assume complete control over the tribes' claims in this case.

In approving this usurpation of the tribes' rights to control their own legal affairs, the Federal Circuit is establishing an unprecedented, discriminatory new rule that invites abuse of Indian rights in a broad range of Indian cases, not simply those arising under the Indian Claims Commission Act. Like the present case, many other Indian cases involve multiple parties, complex and difficult issues and lengthy litigation. *See, e.g., County of Oneida* v. *Oneida Indian Nation of New York*, 470 U.S. 226 (1985), a case filed in 1970 that is pending in the federal district court today. If the Federal Circuit's ruling is permitted to stand, it would allow attorneys who are frustrated or dissatisfied with an Indian tribe's legal strategy or choice of remedies to impose their will over the objection of their Indian clients.

The Federal Circuit's decision conflicts with the other Circuits, none of which has permitted such an arrogation of authority by attorneys. Throughout the federal court system, it has long been settled that Indian tribal governments are, like other governments, entitled to retain their own counsel and that each tribe is entitled to assert, dismiss or settle its legal claims as it sees fit. This is in accord with federal policies established by Congress to support Indian self-determination and Indian control over the legal affairs of their own tribes and nations. 25 U.S.C. § 450 *et seq.* (Indian Self-Determination and Education Assistance Act); 25 U.S.C. § 461 *et seq.* (Indian Reorganization Act).

The Federal Circuit's unsettling and disruptive departure from well-established federal law and policy is shown by the Court's failure even to discuss the federal statutes that require the attorneys to have contracts with the petitioner tribes approved by the Secretary of the Interior. Those statutes, 25 U.S.C. §§ 70n, 81 and 476, require formal contracts between Indians and attorneys, uphold the right of Indian tribes to be represented by counsel of their choice and require the Secretary to oversee all Indian claims contracts with attorneys. This statutory law is in keeping with case law requiring the courts to supervise counsel and to assure faithful representation of Indian tribes. *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315 (1927).

Without contracts or Secretarial approval and in conflict with their "clients", the attorneys litigated the petitioner tribes' claims. The Federal Circuit's approval of this departure from settled law is antithetical to the proper judicial management of litigation involving Indian claims. The Federal Circuit's standardless new rule denies basic rights of great value to the petitioner tribes and invites abuse against Indian parties in the numerous Indian cases that are brought in the federal courts every year. Plenary consideration of the matter by this Court is essential.

II. The Federal Circuit's decision conflicts with decisions of this Court and of other Circuits that prohibit attorneys from settling cases without express consent of their clients.

The attorneys settled the case without the required consent of their "clients". This is in conflict with well-established precedent.

Attorneys are prohibited from entering into a settlement of their clients' claims without express client consent. Chief Justice John Marshall first affirmed that common law rule in *Holker* v. *Parker*, 11 U.S. (7 Cranch)

435 (1813). "[A]n attorney-in-law, merely as such, has, strictly speaking, no right to make a compromise." *Id.* at 452. That rule remains the law today. *United States* v. *Beebe*, 180 U.S. 343 (1901); *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964); *Garabedian* v. *Allstates Engineering Co.*, 811 F.2d 802 (3d Cir. 1987); *Morgan* v. *South Bend Community School Corp.*, 797 F.2d 471 (7th Cir. 1986); *Fennel* v. *TLB Kent Co.*, —— F.2d ——, 57 LW 2425 (2d Cir. Jan. 10, 1989). The dissent below points out that the majority decision is in conflict not only with this established precedent, but also with the Federal Circuit's own earlier ruling prohibiting imposition of a similar settlement in this very case. *Cheyenne River Sioux Tribe* v. *United States, supra.* The rule prohibiting attorneys from imposing settlements is incorporated into the Code of Professional Responsibility. "[I]t is for the client to decide whether he will accept a settlement offer . . ." Ethical Consideration 7-7, *Code of Professional Responsibility. See also,* Disciplinary Rule 5-106(A) requiring attorneys with two or more clients to obtain informed consent to settlement from each client.

The Federal Circuit erroneously calls the settlement in this case a "stipulation of facts" that attorneys may make on their own. The dissent calls it a settlement requiring client consent. The record shows that the actions taken by the attorneys to terminate the case were not mere evidentiary stipulations or stipulations of fact that counsel routinely make in litigation. Here the attorneys made a final settlement of all of the tribes' claims, based on a joint motion for entry of judgment which incorporated a stipulation by counsel. It includes an agreement by counsel to $3.7 million in offsets against the Indians' claims, and it forecloses all appeals by the parties. See pp. 44a-49a, *infra.* The Federal Circuit's characterization of these actions as merely a stipulation of facts is in conflict with the accepted meaning of the term and seems tailored to

circumvent the rule against attorney control over settlements.

The Federal Circuit's decision does not, however, turn on whether this was a settlement or not. After addressing that issue the majority makes clear that in its view the attorneys were empowered to proceed with the case to final judgment as they pleased, without petitioners' consent. In sum, petitioners were not entitled to interfere with the prosecution and termination of the case. The Court reasons that the tribes could not object to the actions counsel took to terminate the case, because they did not substitute new counsel and because "[i]t is too late in the game." See p. 12a, *infra*. The tribes' financial inability to retain substitute counsel is brushed aside and not even addressed. Thus, the Federal Circuit endorses the attorneys' unfettered control over petitioners' claims and sanctions the attorneys' active opposition to the tribes, not only as an interim measure, but also up to and including the final settlement.

The Federal Circuit's decision sharply conflicts with long-established law and precedent prohibiting attorneys from settling cases without their clients' consent. This decision would deny Indians, and perhaps others, control over vital decisions involving the compromise and disposition of their legal claims. Review should be granted to rectify this conflict.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Appeal No. 88-1236

THE SIOUX TRIBE OF INDIANS,
Plaintiff-Appellee,

OGLALA SIOUX TRIBE AND ROSEBUD SIOUX TRIBE,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

Nov. 23, 1988

Before FRIEDMAN, NEWMAN and ARCHER, Circuit Judges.

FRIEDMAN, Circuit Judge.

This is another, and hopefully the last, chapter in the lengthy saga of the attempt by the Sioux Indians under the Indian Claims Commission Act, 25 U.S.C. § 70 et seq. (1976), to recover damages for the land they ceded to the United States under an 1868 treaty.

The present appeal is by two of the Sioux tribes from the dismissal by the United States Claims Court of their motion for relief from a judgment awarding the Sioux

Indians approximately $40 million. *Sioux Tribe of Indians v. United States*, 14 Cl.Ct. 94 (1987). The appellants, however, do not challenge the award as inadequate. Instead, they contend that their counsel of record acted without authority in obtaining the award on their behalf. They seek a vacation of the judgment making the award and a dismissal of the case with respect to them. Their purpose in seeking this action is to facilitate their attempt to obtain a return of the land they ceded to the government 120 years ago.

We hold that the Claims Court did not abuse its discretion in denying the appellants' motion for relief from the judgment, and affirm that ruling.

I

A. The background facts have been fully set forth in earlier opinions of this court and our predecessor court, *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046 (Fed.Cir.1986), *cert. denied sub nom.. Oglala Sioux Tribe v. United States*, — U.S. ——, 107 S.Ct. 3184, 96 L.Ed.2d 673 (1987), *United States v. Sioux Tribe*, 222 Ct.Cl. 421, 616 F.2d 485 *cert. denied sub nom., Yankton Sioux Tribe v. United States*, 446 U.S. 953, 100 S.Ct. 2920, 64 L.Ed.2d 810 (1980), *Sioux Tribe v. United States*, 205 Ct. Cl. 148, 500 F.2d 458 (1974), and are briefly summarized here.

This case was filed in 1950 with the Indian Claims Commission (Commission). 25 U.S.C. § 70 *et seq.* (1976). Because the Sioux Tribe of Indians has not existed as an entity since 1890, the suit was brought by the eight present-day Sioux reservation tribes in a representative capacity. 25 U.S.C. § 70i (1976). After protracted proceedings, the Commission found that the value of the land at its cession in 1869 was $45,685,000. The Commission held that the United States could not deduct any of the permissible statutory offsets because of the gov-

ernment's dishonorable dealings with the Sioux. The Commission awarded the Sioux $43,949,700. *Sioux Tribe v. United States*, 42 Ind.Cl.Comm. 214, 232, 257 (1978).

On the government's appeal, which was limited to the offsets issue, the Court of Claims held that "the Commission erred in refusing to consider reducing the award by any payments on the claim or gratuitous offsets." *United States v. Sioux Tribe*, 222 Ct.Cl. 421, 616 F.2d 485, 492 (1980). The court remanded the case to its Trial Division, the successor to the Commission, "to determine whether the award should be reduced" by "determin[ing] the merits of defendant's claim for offsets based on both alleged payments on the claim and gratuitous offsets." 616 F.2d at 494.

Following the remand, attempts to settle the case were unsuccessful. The government offered to settle the offset issue for $4,200,000, but a majority of the tribes rejected the offer either explicitly or implicitly. *See Cheyenne River Sioux Tribe*, 806 F.2d at 1048-49. Ultimately the Claims Court, the successor to the Trial Division of the Court of Claims, concluded in 1985 that the litigation had become "an uncontrolled quagmire" and that "[t]he simple fact that four of the reservation tribes are refusing to accept any settlement or award of this Court, which does not include the return of their land, is indicative of the plaintiff's [sic] refusal to comprehend, after 35 years of litigation, that this Court can only award money judgments." *Sioux Tribe of Indians v. United States*, 8 Cl.Ct. 80, 85-86 (1985). The court accordingly

> terminate[d] this litigation and . . . award[ed] the plaintiff $39,749,700 as fair and equitable compensation for its claims. This amount reflects the parties' counsels' negotiated settlement agreement as to what they considered to be fair and equitable compensation for the plaintiff's claims, and, more importantly, it represents an amount that this Court

> believes constitutes fair and equitable compensation for the plaintiff's historical claims, after taking into consideration the plaintiff's interlocutory land valuation award of $43,949,700 and the Federal Government's offset claims of some $65 million.

8 Cl.Ct. at 81.

We held that the Claims Court improperly had imposed upon the parties a settlement to which they had not consented, vacated the award of $39,749,700, and remanded the case to the Claims Court "for further proceedings in accordance with this opinion." 806 F.2d at 1053. We further stated, however:

> In vacating the judgment of the Claims Court and remanding for further proceedings, we are not suggesting that a complete trial on all of the offset issues will be required. . . .
>
> . . . [T]he parties may be able to stipulate the total dollar amount of various categories of offsets to which the government is entitled. If the parties can so stipulate, this may be action that counsel for the Sioux Tribe can take as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients.

Id.

B. On July 29, 1987, seven months later, the parties filed in the Claims Court a Stipulation of Facts "regarding the offsets of the government in this case" and a joint motion "to enter judgment in accordance with the Stipulation of Facts." The stipulation recited that it was made "pursuant to the suggestion of the Federal Circuit Court of Appeals."

In paragraph 8 of the stipulation, the parties "stipulate[d] that the United States is entitled to the following offsets:" it then listed five categories of offsets totaling $3,703,892.98. The stipulation provided that "[t]he

parties intend that approval of this Stipulation of Facts by the Claims Court shall constitute its determination that the categories of offsets set forth in paragraph 8 are allowable as a matter of law" and that "[u]pon such approval by the Court, a final judgment may be entered in the sum of $40,245,807.02, which represents the gross award of $43,949,700 less payments on the claim of $3,703,892.98 in favor of the Sioux Tribe of Indians by its representatives [the names of the eight Sioux Tribes followed]." The stipulation also stated that it would be "null and void" unless approved by the Claims Court.

The Motion for Entry of Judgment stated: "The parties move the Court to approve the Stipulation of Facts and to enter judgment in accordance with the Stipulation of Facts in the amount of $40,245,807.02 which represents the gross award of $43,949,700 less stipulated offsets of $3,703,892.98." Both the Stipulation of Facts and the Joint Motion for Entry of Judgment were signed by counsel of record "For the Plaintiffs," Arthur Lazarus, Jr., and by a Department of Justice attorney "For the Defendant." In accordance with the motion, the Claims Court the following day entered judgment that "plaintiff recover of and from the United States the sum of $43,949,700 less stipulated offsets of $3,703,892.98 for a net amount of $40,245,807.02."

C. Two months later, on September 28, 1987, the appellants, the Oglala Sioux Tribe and the Rosebud Sioux Tribe, filed a motion for relief from the judgment. The motion, filed pursuant to Rule 60(b) of the Rules of the Claims Court, which parallels Rule 60(b) of the Federal Rules of Civil Procedure, stated that

> [t]he plaintiff Indian tribes have not given their consent to the stipulation on which the judgment is based. The attorneys who appeared on behalf of plaintiffs and agreed to the stipulation and entry of

> judgment took these actions without notice to or approval of plaintiffs as required by law. As a result, the judgment is void. If permitted to stand, the judgment would damage and impair substantial rights and interests of the plaintiff tribes.

The Claims Court denied the motion. The court noted:

> At no time before this Court entered judgment did any one of the eight reservation tribes raise any legal or factual objection to the Federal Circuit's suggestion that counsel may be able to stipulate the facts in this case, or to this Court's endorsement and encouragement of the Federal Circuit's suggestion. Nor at any time prior to judgment has any one of the reservation tribes moved for leave to substitute counsel.

14 Cl. Ct. at 100.

The court stated that the Indians argued that "the attorney(s) of record in this case had no authority to enter into a Stipulation of Facts which, when approved by this court, formed the basis for the court to enter the final judgment herein" and that

> the Stipulation of Facts was really a settlement agreement which was not authorized by the [appellant Sioux] tribes. Moreover, they assert that substantial legal, moral, and political interests of the tribes would be harmed if the judgment is not vacated.

Id.

In a lengthy memorandum order the court rejected these contentions.

The court first ruled that the judgment was not a settlement agreement. The court stated that stipulation "provided, in substance, that *if* the Court determined the listed categories of offsets to be allowable as a matter of law, then the dollar amounts of those offsets were agreed

upon by the parties to total $3,703,982.98 as a matter of fact." *Id.* at 102 (footnote omitted). The court further stated:

> The Stipulation of Facts in this case led to the entry of a final judgment by the Court. This result followed not because judgment was entered upon the stipulation, but rather because, after the Court's ruling as to the offsets allowable as a matter of law and the Court's subsequent approval of the agreed offset amounts, no issue remained in the case to litigate. It would be bizarre indeed if the Court were to allow this case to remain open and on its docket when nothing more needed to be resolved. Thus, the Stipulation of Facts did no more than eliminate the need for trial on a finite, easily resolvable factual question—the dollar amount of described Government expenditures—and in no way effected a compromise or settlement of the overall 1868 Treaty claim.

14 Cl. Ct. at 103.

The court then rejected the argument that "the attorney(s) of record for the plaintiff tribe were not authorized to represent them [the appellant tribes] in this litigation, and thus they were not authorized to enter into the Stipulation of Facts with the Government in this case." *Id.* The court further stated that

> neither movant party has ever asked this Court to substitute new counsel, or sought to enter a separate appearance, or otherwise attempted to assert through legal process a position independent of the Sioux Tribe and of the six other Sioux reservation tribes in these proceedings. It is too late in the game to do this now. Having failed over a 37-year period to raise any substantive objection to what was happening, the Oglala Sioux Tribe and the Rosebud Sioux Tribe now are precluded and estopped from initiat-

> ing their belated attack upon the judgment of this Court, an attack which the Sioux Tribe and the six other Sioux tribal representatives do not join.

14 Cl. Ct. at 104-05 (footnotes omitted).

Finally, the court rejected the tribe's argument that "substantial legal, moral and political interests of the tribes would be harmed if the judgment is not vacated." 14 Cl. Ct. at 105. The court noted that "[t]he movants simply want their ancestral land returned." *Id.* at 105. The court declined to vacate its judgment on this ground and stated that "[i]t is not for this Court to say whether the Congress of the United States will ever decide to return some or all of the Sioux land." *Id.*

II

"The grant or denial of a motion for relief from judgment is discretionary, and the standard of review therefore is whether the trial court abused its discretion." *United States v. Atkinson*, 748 F.2d 659, 660 (Fed. Cir. 1984) (citation omitted). The Claims Court did not abuse its discretion in denying the appellant tribes' motion for relief from the judgment awarding the Sioux Tribe of Indians approximately $40 million.

A. The Claims Court correctly ruled that the Stipulation of Facts and the Joint Motion to Enter Judgment in Accordance with the Stipulation, on the basis of which the court entered its judgment, were not a settlement agreement which required consent of the appellant tribes.

Since 1980, the only remaining issue in this case had been the amount of offsets, if any, by which the government would reduce the initial award of $43,949,700 to the Sioux. In our 1986 decision vacating the imposition of the unconsented settlement on the parties, we stated that if the parties could "stipulate the total dollar amount of various categories of offsets to which the government

is entitled . . . this may be action that counsel for the Sioux Tribe can take as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients." 806 F.2d at 1053.

The stipulation recited that it was made pursuant to that suggestion. The parties did precisely what our suggestion contemplated—stipulated the dollar amount of the various categories of offsets to which the government was entitled. The stipulation left it to the Claims Court to determine whether those offsets "are allowable as a matter of law" and provided that unless the Claims Court ruled that they were, the Stipulation, of Facts would be "null and void."

We agree with the Claims Court that entering into such a stipulation of facts was "exactly the type of determination (*i.e.*, analysis of the evidence) that attorneys can undertake 'as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients.'" 14 Cl. Ct. at 103 (citing *Cheyenne River Sioux Tribe*, 806 F.2d at 1053). *See Lipp v. National Screen Serv. Corp.*, 290 F.2d 321, 322 (3d Cir.), *cert. denied*, 368 U.S. 835, 82 S.Ct. 61, 7 L.Ed.2d 36 (1961) ("There is no doubt in our minds that this arrangement to expedite this litigation to final conclusion was well within the authority of the lawyers who participated."); *cf. United States v. Texas*, 523 F. Supp. 703, 711 (E.D. Tex. 1981) ("The entering into evidentiary stipulations, before or during trial, falls squarely within an attorney's sphere of authorized conduct.")

The appellant tribes contend that the joint motion for entry judgment converted this factual stipulation into a settlement of the case. Once the parties had agreed upon the amount of offsets, however, there was no remaining issue concerning the amount the Sioux Tribe of Indians was entitled to recover. They were entitled to receive the difference between the $43,949,700 originally

awarded and the stipulated offsets. The entry of the judgment for the amount of the difference was a ministerial act which the Claims Court would have performed even without the joint motion for entry of judgment. As that court noted, "[i]t would be bizarre indeed if the Court were to allow this case to remain open and on its docket when nothing more needed to be resolved." 14 Cl. Ct. at 103.

B. We also agree with the Claims Court that counsel of record for the Sioux Tribe of Indians had authority to enter into the Stipulation of Facts that resulted in the final judgment.

As the Claims Court noted, for more than 30 years counsel vigorously and effectively pressed this case on behalf of the Sioux Indians. For most of that time, the appellant tribes neither objected to the way counsel handled the litigation nor questioned his authority to represent them.

In 1980, Mr. Lazarus moved to withdraw as counsel for the Oglala Sioux Tribe, and in 1985, he moved to withdraw temporarily for the Oglala Sioux Tribe and the Cheyenne River Sioux Tribe, both of which had appealed the Claims Court 1985 judgment. On neither occasion did the tribes respond to counsel's motion. The Court of Claims denied the 1980 motion without prejudice and stated that the "motion may be renewed, however, at such time that the Oglala Sioux Tribe seeks by appropriate motion to make a proper substitution of counsel." The Claims Court denied the 1985 motion without prejudice because the case "requires that competent, experienced and knowledgeable counsel remain as attorney of record, until there has been an appropriate attorney substitution of counsel."

In November 1987, two months after they had filed their motion for relief from the judgment, the appealing tribes filed a motion to change their attorney of record.

After the Claims Court denied the motion for relief from the judgment, it noted that the motion to change attorneys was moot.

The attorneys of record had been serving under contracts with each of the eight Sioux Tribes, originally entered into more than 30 years ago, which the Secretary of the Interior initially had approved and which were renewed at periodic intervals. The appellant tribes contend that because they did not renew their contracts with their attorneys of record in the late 1970's and early 1980's, the authority of those attorneys to act for them in this case lapsed, and that those attorneys no longer represented them and therefore could not sign the stipulation of facts in their behalf.

As noted, this case had been vigorously litigated for more than 30 years, and the Sioux had prevailed on a number of difficult issues. By 1980, the only question still unresolved was the amount of the government's offsets. We agree with the Claims Court that in these circumstances, the appellant tribes were required to do something more than not renew their attorney's contracts if they wished to terminate their attorneys' authority to represent them. They should affirmatively and formally have advised the attorneys that they were terminating the attorney-client relationship, and then should have promptly moved in the Court of Claims to substitute new counsel to represent them. See Rule 81(d) of the Rules of the Claims Court.

The Claims Court was fully justified in refusing to terminate the authority of the attorneys who had been handling this complex litigation for 30 years and were at the point of successfully completing it, unless and until the appellant tribes moved to substitute new counsel who could continue to handle this case without significant delay.

C. Finally, the appellant tribes contend that the judgment should be vacated to give them the opportunity to seek dismissal as to them and presumably to deny them the benefits of the $40 million award in favor of the Sioux Tribe of Indians.

Since this suit was brought in a representative capacity by the eight Sioux tribes to cover the damages the Sioux Nation had suffered as a result of the 1868 Treaty, the elimination of the two appellant tribes as plaintiffs in the suit would not change the judgment in favor of the Sioux Tribe of Indians. In any event, if the two appellant tribes wanted to be eliminated as parties plaintiff, they had ample opportunity to take appropriate action to accomplish that result during the many years in which this case was vigorously pressed on behalf of all eight Sioux tribes and during which they apparently acquiesced in, and approved of, their attorneys' endeavors in their behalf. As the Claims Court justifiably concluded: "It is too late in the game to do this now."

CONCLUSION

The order of the United States Claims Court denying the appellant tribes' motion for relief from the judgment is

AFFIRMED.

COSTS

The parties to bear their own costs.

PAULINE NEWMAN, Circuit Judge, dissenting.

This case has been decided for the best and worst reasons: to end some thirty-eight years of litigation, by a monetary payment the maximum amount of which was decided in 1978; yet denying the majority of the plaintiff Sioux Indians, as comprise the Oglala and the Rosebud Sioux tribes, the right to withdraw their action.

I offer no view on the prospects for the alternate remedy desired by the Oglala and Rosebud and apparently other Sioux tribes, but I greatly question the basis of the Claims Court's decision.

The proceedings from which this appeal is taken derived from a misperception, now apparently ratified by this court, of our prior decision in this cause. In *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046 (Fed.Cir.1986), *cert. denied sub nom. Oglala Sioux Tribe v. United States*, — U.S. ——, 107 S.Ct. 3184, 96 L.Ed.2d 673 (1987), we rejected the Claims Court's determination of the dollar amount of gratuitous offsets based on a unilateral offer by the government. We held that the amount of offsets could not be imposed by "a settlement negotiated by counsel to which the parties did not agree", *id.* at 1052, and we suggested that counsel for the Sioux tribes could negotiate the offsets with counsel for the United States. I do not read in that suggestion any authorization to counsel for the Sioux tribes to enter into a binding agreement with the government, or to achieve final judgment thereon by joint motion, contrary to express instructions of the client tribes that represent the majority of Sioux Indians.

The prior counsel for these Sioux tribes, and counsel for the United States, now join together in arguing that these tribes can not withdraw from the stipulation between counsel, although it was neither authorized nor accepted, and can not impeach the ensuing final judgment, for the reason—apparently the only reason—that

the judgment applies to "the Sioux Tribe of Indians" and not to the individual tribes. The Sioux Tribe of Indians is no more than a collective name used for convenience in the case caption for these eight plaintiffs. The actual Sioux Tribe of Indians was dissolved in 1890.

Each of the eight Sioux tribes that joined to start these proceedings before the Indian Claims Commission had, apparently, entered into a contract with counsel. Most of these contracts have terminated and are no longer in effect. It is inconceivable to me that, with over half the clientele in loud revolt, nominal counsel has the authority to bind these tribes, against their intentions and instructions. Further, the United States as well as the Claims Court had full knowledge, throughout the past several years of these proceedings, that most of the principals objected to the negotiations and to the purported settlement.[1] "The law is settled that an attorney of record may not compromise, settle, or consent to a final disposition of his client's case without express authority." *Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 136, 139 (10th Cir.1966) (on appeal from denial of a Rule 60(b) motion (as in the case at bar), reversing as to a defendant who did not consent to the stipulation and entry of judgment agreed to by his attorney, because not informed of the agreement beforehand).

The Claims Court held that the Stipulation of Facts and the Joint Motion to Enter Judgment were a routine act of counsel, of the nature of the "evidentiary stipulation" authorized in *United States v. Texas*, 523 F. Supp.

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[1] As discussed by the Claims Court, of the eight plaintiff Sioux tribes, appellants and the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, the Lower Brule Sioux Tribe, and the Fort Peck Sioux Tribe, desired to seek a return of ancestral land rather than a money award; the Crow Creek Sioux Tribe and the Santee Sioux Tribe were the only plaintiffs willing to accept the money settlement. *Sioux Tribe of Indians v. United States*, 8 Cl.Ct. 80, 86-90 (1985).

703, 711 (E.D. Tex. 1981), and thus binding on the client. The Oglala and Rosebud tribes argue that the Stipulation of Facts, *inter alia* that the offsets total $3,707,892.98, and the Joint Motion to Enter Judgment, comprise a settlement agreement and thus can not bind the principal if unauthorized and unaccepted.

The entry of judgment is surely not a routine "evidentiary stipulation" such as is encountered in day-to-day trial management: not only because the stipulation disposes of some 3.7 million dollars in moneys previously adjudged to be due the Sioux Indians; but because counsel for both sides knew that since at least 1979 tribes representing a majority of Sioux Indians had given instructions contrary to the settlement. The record contains two resolutions by the Oglala Sioux Tribal Council informing counsel that it no longer sought money damages, but wanted to pursue legal and legislative strategies to gain return of ancestral lands. These resolutions also directed counsel to have the Oglala Sioux Tribe dismissed from this litigation. *See* Tribal Council Res. No. 81-98 (Oct. 29, 1981); Tribal Council Res. No. 83-160 (Sept. 13, 1983).

A lawyer can not be authorized by a court to make a settlement and bind the client contrary to the client's wishes. Nor can either the court or the United States ignore the tribes' several attempts to discontinue Mr. Lazarus' representation.[2] The court does not discuss the asserted violation of 25 U.S.C. § 81.

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[2] After the expiration of his contract in 1977, the Oglala Sioux notified Mr. Lazarus that he was no longer authorized to act on the Tribe's behalf. *See* Tribal Council Res. No. 81-68 (May 19, 1981) ("Arthur Lazarus, Jr., Esquire has no authority to represent the Oglala Sioux Tribe in any claims litigation, . . . and that any action taken or that may be taken purportedly on behalf of the Oglala Sioux Tribe by Mr. Lazarus will be completely disavowed by the Oglala Sioux Tribe"); letter from Oglala Vice President John W. Steele to Arthur Lazarus, Jr. (Nov. 15, 1983) ("Your contract

In light of this extended history, the Claims Court's acceptance of the Stipulation of Facts and the grant of the Joint Motion to Enter Judgment is incongruous; and its denial of appellants' motion for relief under Rule 60(b) is in plain error, in light of their undisputed assertion that they were given no prior notice of the settlement.

Our ruling today does more than negate the integrity of the attorney-client relationship. "It is fairly clear that *any* Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes." *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir.), *cert. denied sub nom. Crow Tribe of Indians v. Environmental Protection Agency*, 454 U.S. 1081, 102 S.Ct. 635, 70 L.Ed.2d 615 (1981) (emphasis in original) (citing *Seminole Nation v. United States*, 316 U.S. 286, 297, 62 S.Ct. 1049, 1054-55, 86 L.Ed. 1777 (1942)). *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978) (the Indian tribes are dependent on the government's good faith). Further, the supervision of counsel lies ultimately with the courts. *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 319, 47 S.Ct. 361, 362, 71 L.Ed. 658 (1927).

These obligations include respecting the authority of the tribes to ascertain their own best interests, and not to impose on the tribes the views of their lawyer. The prolonged pendency of this case does not justify the irregular procedure whereby it has been brought to an end.

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with the Oglala Sioux Tribe has terminated in 1977 and it is the position of the Oglala Sioux Tribe that you do not represent the Tribe. . . . You are directed not to take any action inconsistent with this Resolution"). The Claims Court was notified directly by Mr. American Horse, president of the Tribal Council. Mr. Lazarus's motions to withdraw were rejected by the Claims Court, in the absence of designation of substitute counsel.

UNITED STATES CLAIMS COURT

No. 74

SIOUX TRIBE OF INDIANS

v.

UNITED STATES

Dec. 17, 1987

MEMORANDUM ORDER

YOCK, Judge.

Currently pending before this Court is a motion for relief from the judgment entered in this case on July 30, 1987. USCC Rule 60(b). The motion is filed by only two of the eight reservation tribes (Oglala Sioux Tribe and Rosebud Sioux Tribe) that comprise the plaintiff in this case, the Sioux Tribe of Indians. The two reservation tribes assert that the attorney(s) of record in this case had no authority to enter into a stipulation of facts, which, when approved by this Court, formed the basis for the Court to order the final judgment herein.

For the reasons discussed herein, the motion is denied and the judgment as issued will stand.

Factual Background

This case commenced in 1950 under the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. § 70 *et seq.* (1976), in the name of the land-

owning, treaty-signing Sioux Tribe of Indians. The Sioux Tribe of Indians, the owner of the 1868 Treaty claim, has not existed as an entity since 1890. As permitted by the Indian Claims Commission Act (25 U.S.C. § 70i (1976)), suit was brought in a representative capacity on behalf of the Sioux Tribe of Indians by the eight present-day Sioux reservation tribes.[1] After some 28 years of hotly contested litigation, the Indian Claims Commission ultimately entered an award of $43,949,700 in favor of the Sioux Tribe of Indians, free of all offsets.[2] The Commission found that the Sioux Tribe of Indians had been paid an inadequate amount of money for the land it ceded to the United States under the 1868 Treaty. It also found that the Government could not claim any offsets against this award due to a history of dishonorable dealings. *Sioux ~~Tribe~~ v. United States*, 42 Ind.Cl. Comm. 214, 232, 257 (1978).

The Government did not contest the liability award of some $44 million, but did appeal the decision to the United States Court of Claims solely on the offsets issue. Upon reviewing the case on appeal, the Court of Claims reversed the Commission on the offsets issue, finding that it had failed to take into account the entire course of dealings between the Government and the Sioux Tribe since the 1868 Treaty was signed. *United States v. Sioux*

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[1] These eight reservation tribes are the Sioux Tribe of the Rosebud Indian Reservation, the Sioux Tribe of the Standing Rock Indian Reservation, the Sioux Tribe of the Pine Ridge Indian Reservation, the Sioux Tribe of the Cheyenne River Indian Reservation, the Sioux Tribe of the Crow Creek Indian Reservation, the Sioux Tribe of the Lower Brule Indian Reservation, the Sioux Tribe of the Santee Indian Reservation, and the Sioux Tribe of the Fort Peck Indian Reservation.

[2] Previously, the United States Court of Claims, also on a Government appeal, had upheld the Commission's jurisdiction to hear and decide the Sioux Tribe's claim for loss of land under the Treaty of April 29, 1868, 15 Stat. 635. *Sioux Tribe v. United States*, 205 Ct.Cl. 148, 179-86, 500 F.2d 458, 475-78 (1974).

Tribe, 222 Ct.Cl. 421, 616 F.2d 485 (1980). The court allowed the liability award of some $44 million to stand. Thus, that part of the Indian Claims Commission decision became final and the law of the case. *See Temoak Band of Western Shoshone Indians v. United States*, 219 Ct.Cl. 346, 353, 593 F.2d 994, 998, *cert. denied*, 444 U.S. 973, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). The Court of Claims thereafter remanded the case to its trial division (now the United States Claims Court) to determine the merits of the Government's claim for offsets, both payments on the claim offsets, as well as gratuitous offsets. It concluded:

> Since we conclude that the Commission erred in refusing to consider reducing the award by any payments on the claim or gratuitous offsets, the case must be remanded to the Trial Division to determine whether the award should be reduced. In so doing, we do not indicate any view on the application of particular payments to the cession of particular lands, or on the extent, if any, to which the award should be reduced. Those are matters for the trial judge to determine in the first instance. We hold only that the Commission erred in totally barring consideration of those items.

United States v. Sioux Tribe, *supra*, 222 Ct.Cl. at 433, 616 F.2d at 492 (1980).

Upon remand, this Court proceeded to dispose of major segments of the Government's offset claim by issuing several summary judgment opinions. The theory was that if the Court would issue a series of essentially legal rulings, the scope of any trial on the offsets issue would be substantially reduced if not eliminated. At the very least, the rulings would provide a road map for the parties to stipulate to most, if not all, of the facts.

In *Sioux Tribe of Indians v. United States*, 6 Cl.Ct. 91 (1984) (Summary Judgment Opinion I), this Court held

that the Government had the right to proceed to prove its payment on the claim offsets because the 1868 Treaty was in major part a treaty of cession as opposed to peace. The Court cautioned, however, that the Government must be realistic in its claims and not overstep the time limits that were specified in the Treaty. For instance, no offsets would be allowed where Government expenditures were made on behalf of the Sioux Tribe later than 30 years from the date the Treaty was signed. This 30-year period reflected the outside time limit established in the various treaty provisions. Further, it was pointed out that certain expenditures were even further restricted by the Treaty. Article VII of the Treaty, dealing with educational benefits, was specifically stated to continue "not less than 20 years." Article IX allowed the Government to withdraw its support after 10 years. In addition to the time limits discussed, the Court also stated that no offsets would be allowed that could be considered to be agency expenses, nor would offsets relating to food, rations, and provisions be allowed. Thus, even though much of the Court's discussion in Summary Judgment Opinion I (SJ I) was *dicta*, it did provide a useful road map to the parties as to how the Court would ultimately rule as to specific segments of the Government's offset claim.

SJ I was followed by this Court's decision in *Sioux Tribe of Indians v. United States*, 7 Cl.Ct. 468 (1985) (Summary Judgment Opinion II). In that decision, this Court held that the Government could not deduct any gratuitous offsets from the existing liability award because:

> The entire course of dealings between the United States and the Sioux is marked, on the part of the Federal Government, primarily by broken promises, by the rapacious acquisition of land, by the repeated sacrifice of Sioux rights to non-Indian interests, and by the oppression of Sioux society. The record, as

> a whole, and on balance, furnishes no justification for the allowance of gratuitous offsets to be applied against the plaintiff's land valuation award.

Sioux Tribe of Indians v. United States, *supra*, 7 Cl.Ct. at 481. Thus, after SJ I and II had been issued, the Government had been advised that it could no longer deduct *any* gratuitous offsets from the liability award, and that its payment on the claim offsets would be substantially reduced.

Next followed this Court's decision in *Sioux Tribe of Indians v. United States*, 7 Cl.Ct. 481 (1985) (SJ III). In that decision, the Court held that the Government could deduct, as a payment on the claim offset, some $2.7 million from the existing liability award, as the value of the Ponca land that was inadvertently incorporated into the Great Sioux Reservation set up pursuant to the 1868 Treaty. This $2.7 million figure ultimately formed approximately three-fourths of the total offset figure allowed by this Court's judgment of July 30, 1987.

Following these three summary judgment decisions, this Court issued its order that terminated Docket No. 74. *Sioux Tribe of Indians v. United States*, Cl.Ct. 80 (1985). Without repeating the entire history that led up to this order, perhaps a brief synopsis would be helpful. Twice in the last 10 years, the parties' attorneys of record had negotiated an agreement as to the appropriate amounts to be deducted as Government offsets from the liability award. The first time was in 1979. However, the agreement was never consummated, primarily because most of the eight reservation tribes simply refused to consider the offer. Then in 1983, the parties again negotiated an agreement pertaining to the offsets. Again the reservation tribes simply refused to consider the offer. Viewing this as a failure to diligently prosecute its case, the Court ordered the Sioux Tribe's counsel to formally present the settlement offer to the eight res-

ervation tribes' governing bodies and for those governing bodies to consider and act upon the negotiated settlement agreement. *Sioux Tribe of Indians v. United States*, 3 Cl.Ct. 536 (1983), *aff'd by unpublished order*, No. 84-635 (Fed.Cir. Jan. 5, 1984). Two of the eight tribes accepted the negotiated settlement agreement. Two tribes refused it outright with no explanation. Four of the tribes said no to the agreement, since it did not include return of some or all of its ancestral homelands. These four tribes also indicated their desire to withdraw from the Docket No. 74 litigation, since they were interested in recovering their land rather than in recovering a monetary award. *Sioux Tribe of Indians v. United States, supra*, 8 Cl.Ct. at 84. No motion to withdraw was ever presented to this Court, however, either before or after this occurrence. In any event, after the eight reservation tribes had filed their responses to the settlement agreement, it became clear to the Court that after some 35 years in active litigation, the case had reached an impasse. In an effort to break that impasse and to bring this matter to a conclusion in a fair and equitable way, this Court ordered the termination of the case, hoping that the parties would be convinced of the logic of the Court's decision. *Sioux Tribe of Indians v. United States, supra*, 8 Cl.Ct. at 90-92. However, that was not to be, as both parties (and several of the reservation tribes) soon appealed the decision to the Court of Appeals for the Federal Circuit.

In that appeal, the Federal Circuit held, quite appropriately, that this Court could not impose a settlement agreement on the parties to which the parties had not agreed. It therefore reversed and again remanded the case to this Court solely to complete the determination of offsets. *Cheyenne River Sioux Tribe et al. v. United States*, 806 F.2d 1046 (Fed.Cir.1986), *cert. denied, Oglala Sioux Tribe v. United States*, —— U.S. ——, 107 S.Ct. 3184, 96 L.Ed.2d 673 (1987). In its decision, how-

ever, the Federal Circuit did offer several helpful suggestions to assist the parties (and the Court) in bringing this case to an appropriate conclusion. It stated:

> In vacating the judgment of the Claims Court and remanding for further proceedings, we are not suggesting that a complete trial on all of the offset issues will be required. We still urge the Claims Court to develop "innovative handling and treatment, perhaps to devise new procedures that will end the delays that have plagued these cases for so many years." *Navajo Tribe*, 601 F.2d at 540.
>
> For example, perhaps the issues requiring trial can be further narrowed through decision of the three remaining motions for summary judgment and the resolution of any additional summary judgment motions that may be filed. The government may be able to prepare and present summaries of the different categories of offsets it is urging and thus avoid the need for the introduction into evidence of vast quantities of details and minute records going back for more than a century. Finally, the parties may be able to stipulate the total dollar amount of various categories of offsets to which the government is entitled. If the parties can so stipulate, this may be action that counsel for the Sioux Tribe can take as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients. *Cf. Navajo Tribe*, 601 F.2d at 538-39.

Cheyenne River Sioux Tribe et al. v. United States, *supra*, 806 F.2d at 1053.

On remand, this Court, by order dated January 6, 1987, directed that both parties were to meet and discuss the status of the case on or before January 30, 1987, and were to take into consideration the suggestions for disposition offered by the Federal Circuit. Following that meeting, the parties were to file a proposed outline of

disposition with the Court by February 20, 1987 and attend a status conference that was scheduled for March 5, 1987.

At the March 5, 1987 status conference, the parties discussed their respective proposals for disposition of this case. Both parties agreed that they should actively pursue agreement on as many of the facts as possible, and, to this end, requested the Court to advise them of its thinking on several of the matters of law that were still outstanding. The Court thereupon reiterated much of what it had already placed in writing in SJ I, *supra*, and had otherwise advised the parties of orally on numerous occasions. *See* Transcript of Proceedings, Docket No. 74, at 27-32 (March 5, 1987). One matter that had apparently not been addressed previously was whether Article X expenditures were made in lieu of prior treaties or were payments made on the 1868 Treaty. After listening to the respective arguments, the Court found that those expenditures were payments made on the 1868 Treaty. Following this Court's dialogue, the parties again believed that they had the necessary legal guidelines to go back and start putting together a stipulation of facts, hopefully to stipulate completely to the remaining facts pertaining to the offset issue, but, at any rate, to reduce significantly the scope of any necessary trial. The parties thereafter asked for further time to accomplish this goal, which was allowed, and the conference was closed. The Court issued its order to this effect the next day (March 6, 1987) stating in pertinent part:

> After reiterating the Court's views on the various legal issues still outstanding, the parties were encouraged to voluntarily stipulate to all facts and matters that were possible, as suggested by the Federal Circuit's decision, *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046, 1053 (1986). Since the Court received encouraging signs from the parties in this connection, it was ordered that the

parties had 90 days to further explore these possibilities. Therefore, it was and is hereby ordered that:

1. The parties will file a status report on or before June 3, 1987; and

2. A status and procedures conference will be held at 2:00 p.m. on Monday, June 8, 1987, at the National Courts Building, 717 Madison Place, N.W., Washington, D.C.

Since it appears to the Court that the availability of the transcript of the proceedings of March 5, 1987, may be important for reference, the reporter was ordered to prepare the transcript for filing within five work days.

It is significant to note that attending the March 5, 1987 status conference were several representatives from the eight reservation tribes, notable among them was Mr. Joe American Horse, the current president of the Oglala Sioux Tribe, one of the two moving reservation tribes in this action. Mr. American Horse did not request to address the Court nor were any motions or statements made on his behalf at the conference.

Thereafter, on June 3, 1987, the parties filed a joint status report with the Court that reported optimistically that a stipulated resolution of this case was likely to occur. The parties had a draft of the agreement that the counsels for the plaintiff would execute and the Government's attorney would recommend to his appropriate supervisors. The parties pointed out that any stipulation of facts would be subject to the Court's approval as to matters of law. The status conference ordered for June 8, 1987 occurred on that date and the parties basically reiterated what had been reported earlier in the joint status report. Upon request, the parties were given 60

additional days to complete the necessary review procedures.

On July 29, 1987, the parties filed their completed Stipulation of Facts with the Court together with a Joint Motion for Entry of Judgment. On that day and the next, the Court reviewed the Stipulation of Facts for legal sufficiency and factual appropriateness. The stipulation was expressly made subject to the approval of the Court. The stipuation, in order to be effective, further required that the Court determine that the categories of offsets set forth in the stipulation were allowable as a matter of law. The stipulation thus provided, in substance, that if the Court determined the listed categories of offsets to be allowable as a matter of law, then the dollar amounts of these offsets were agreed upon by the parties to total $3,703,892.98 as a matter of fact. Moreover, if the Court did not rule on the legal issues consistent with its prior opinions, the Stipulation of Facts would be null and void. Pertinent parts of the Stipulation of Facts at issue read as follows:

> 6. This stipulation is made pursuant to the suggestion of the Federal Circuit Court of Appeals. *See*, also, transcript of proceedings before the Claims Court on March 5, 1987, at pp. 32, 35-36.
>
> 7. The Claims Court has indicated to the parties, clearly and in some detail, as to how it will rule on the remaining legal issues involving allowance of offsets. *See* 6 Cl. Ct. at 95-96; transcript of proceedings on March 5, 1987, at pp. 27-32.
>
> 8. Based upon the holdings of the Court, as set forth in paragraph 3, and the Court's further views about the applicable law, as set forth in paragraph 7, plaintiff and defendant stipulate that the United States is entitled to the following offsets on the Sioux 1868 Treaty claim:

$2,669,762.20	Land
$ 408,753.87	Educational expenditures for 20 years
$ 28,572.68	Article 8 Agriculture expenditures for 10 years
$ 415,135.99	Article 10 expenditures exclusive of food, rations or provisions
$ 181,668.24	Article 13 expenditures exclusive of stipulated educational payments that are duplicative
$3,703,892.98	Total Offsets

9. The parties intend that approval of this Stipulation of Facts by the Claims Court shall constitute its determination that the categories of offets set forth in paragraph 8 are allowable as a matter of law.

10. Upon such approval by the Court, a final judgment may be entered in the sum of $40,245,807.02, which represents the gross award of $43,949,700 less payments on the claim of $3,703,892.98 in favor of the Sioux Tribe of Indians by its representatives, the Sioux Tribe of the Rosebud Indian Reservation, the Sioux Tribe of the Standing Rock Indian Reservation, the Sioux Tribe of the Pine Ridge Indian Reservation, the Sioux Tribe of the Cheyenne River Indian Reservation, the Sioux Tribe of the Crow Creek Indian Reservation, the Sioux Tribe of the Lower Brule Indian Reservation, the Sioux Tribe of the Santee Indian Reservation, and the Sioux Tribe of the Fort Peck Indian Reservation.

11. This Stipulation of Facts shall be null and void unless it is approved by the Claims Court, as provided in paragraph 9, and unless the final judgment entered pursuant to paragraph 10 is based upon the precise figures set forth in paragraph 8. Subject to such approval and entry of final judgment, defendant withdraws without prejudice all offsets asserted

in this case which do not constitute expenditures under the 1868 Sioux Treaty.

Respectfully submitted,

For the Plaintiffs:

[Signature]

Arthur Lazarus, Jr., P.C.

Fried, Frank, Harris, Shriver & Jacobson
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004
(202) 639-7000

Of Counsel:

Marvin J. Sonosky, Esquire
William Howard Payne, Esquire

For the Defendant:

[Signature]

Roger Marzulla
Acting Assistant Attorney General

[Signature]

Edward J. Passarelli
Attorneys for Defendant
U.S. Department of Justice
Land and Natural Resources Division
Benjamin Franklin Station
P.O. Box 663
Washington, D.C. 20044
(202) 633-2794

On July 30, 1987, this Court approved the Stipulation of Facts and directed the entry of judgment in the sum of $40,245,807.02, representing the liability award of $43,949,700 less the allowable offsets of $3,703,892.98. The Court thereafter entered a judgment in that amount on July 30, 1987.

At no time before this Court entered judgment did any one of the eight reservation tribes raise any legal or factual objection to the Federal Circuit's suggestion that counsel may be able to stipulate the facts in this case, or to this Court's endorsement and encouragement of the Federal Circuit's suggestion. Nor at any time prior to judgment has any one of the reservation tribes moved for leave to substitute counsel.

On September 23, 1987, the Oglala Sioux Tribe and the Rosebud Sioux Tribe, through outside counsel, filed a notice of appeal from the judgment. On September 28, 1987, the same two reservation tribes filed the current motion for relief from judgment with this Court.[3] None of the other six reservation tribes has joined in this motion.

Discussion

As indicated above, the current motion before the Court was filed by two of the eight reservation tribes (Oglala Sioux Tribe and Rosebud Sioux Tribe) that comprise the plaintiff in this case, the Sioux Tribe of Indians. The two reservation tribes (O/R tribes) contend in their motion that the attorney(s) of record in this case, had no authority to enter into a Stipulation of Facts, which, when approved by this Court, formed the basis for the Court to order the final judgment herein. More specifically, movants argue that the Stipulation of Facts was really a settlement agreement which was not authorized by the O/R tribes. Moreover, they assert that substantial legal, moral, and political interests of the tribes would be harmed if the judgment is not vacated.

Both the plaintiff in this action and the Government oppose the motion by arguing three basic points. First, they argue that the movants have confused the difference between a stipulation of facts entered into between the attorneys of record for the parties and a settlement agreement. Here, the attorneys of record assert that the par-

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[3] Any potential jurisdictional problem with this Court's authority to proceed with the pending motion for relief from judgment has been removed since the Federal Circuit has already dismissed the two reservation tribes' appeal as premature. *Oglala Sioux Tribe and Rosebud Sioux Tribe v. Sioux Tribe of Indians and The United States*, Appeal Docket 87-1634 (Fed.Cir. Nov. 5, 1987) (unpublished). *See also Yachts America, Inc. v. United States*, 8 Cl.Ct. 278, 280-81, *aff'd*, 779 F.2d 656, 662 (1985), *cert. denied, Wilson v. United States*, —— U.S. ——, 107 S.Ct. 122, 93 L.Ed.2d 68 (1986).

ties have entered into a stipulation of facts, and a rather minimal one at that, which in no way can be considered a settlement of this case, especially when placed in the proper context of a case that has been actively litigated for some 37 years. Secondly, both parties contend that it is far too late in the game for the movants to contest the authority of the attorney(s) of record for the plaintiff to act on the plaintiff's behalf. The Sioux Tribe and the Government question the movants' standing to object at this final stage and point out that prior to the entry of judgment there has never been a motion filed by the movants to substitute new counsel. Nor has there ever been filed with this Court a motion to voluntarily dismiss this case. Third and finally, both parties assert that the plaintiff tribe is not aggrieved. They point out that six of the eight reservation tribes have not joined in the motion, thus apparently disagreeing with the movants' goals. Further, the parties state, assuming the motive for the motion is to keep the case alive until Congress agrees to return some or all of their ancestral land, that even after a judgment the movant tribes may still petition the Congress for that purpose. Therefore, the parties conclude that the plaintiff tribe has not been aggrieved by the judgment, and that, in fact, the judgment is completely in its best interests.

USCC Rule 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment.

A motion for relief from judgment is one for extraordinary relief entrusted to the discretion of the Court, *United States v. Atkinson*, 748 F.2d 659, 660 (Fed.Cir.

1984), which may be granted only in exceptional circumstances, *Washington Medical Center, Inc. v. United States*, 211 Ct.Cl. 379, 380 (1977). Viewing the moving parties' motion in light of those standards, this Court concludes that the motion should be denied and that the judgment should stand.

When it remanded this case last December to this Court for a determination of offsets, the Court of Appeals for the Federal Circuit suggested that "the parties may be able to stipulate the total dollar amount of various categories of offsets to which the government is entitled. If the parties can so stipulate, this may be action that counsel for the Sioux Tribe can take as part of the normal conduct of litigation without the necessity of obtaining the approval of their clients." *Cheyenne River Sioux Tribe v. United States*, *supra*, 806 F.2d at 1053. On remand, this Court, in its order filed March 6, 1987, *supra*, at 12-13, strongly urged counsel of record to follow the Federal Circuit's recommendation concerning stipulations of fact ("the parties were encouraged to voluntarily stipulate to all facts and matters that were possible, as suggested by the Federal Circuit's decision * * *.").

Movants here contend, in effect, that the judgment of this Court is void because the attorney(s) of record for the Sioux Tribe actually followed the suggestion of the Court of Appeals, which this Court endorsed and encouraged. Movants' argument as to the judgment's alleged invalidity certainly is unique, but hardly is persuasive. As the discussion below will demonstrate, a Stipulation of Facts was entered into by counsel "as part of the normal conduct of litigation" and clearly was not a settlement agreement.

The nature of this Stipulation of Facts can best be understood, of course, in context. Briefly stated, after some 27 years of difficult and intensive litigation, the Indian Claims Commission nine years ago entered a lia-

bility award in this case of $43,949,700 in favor of the Sioux Tribe of Indians, free of all offsets. *Sioux Tribe v. United States*, 42 Ind.Cl.Comm. 214, 257 (1978). The Government appealed solely on the question of offsets. The Court of Claims reversed and remanded the case for trial to determine the merits of the defendant's claim for offsets, both payments on the claim and gratuitous offsets, as the sole remaining issue. *United States v. Sioux Tribe*, 222 Ct.Cl. 421, 616 F.2d 485 (1980).

By 1980, therefore, all issues with respect to the Commission's jurisdiction to hear the 1868 Treaty claim had been litigated and resolved. All issues with respect to Sioux land title had been litigated and resolved. All issues with respect to the overlapping claims of other Indian tribes had been litigated and resolved. All issues with respect to the Government's liability had been litigated and resolved. All issues with respect to the value of the Sioux lands acquired by the United States had been litigated and resolved. These were incredibly complex matters that were resolved by litigation and final opinions. The sole remaining issue was the amount of allowable offsets.

By the time of the entry of final judgment in July of 1987, the offset question had been pending before this Court for an additional seven years. During that period, the parties and the Court were not idle. Following a trial session on the historical aspects of this case (May 10-13, 1982), and after extensive briefing, the Court ruled in several summary judgment decisions, that the defendant was not entitled to deduct any gratuitous offsets, but that the defendant was entitled to deduct $2,669,762.20, representing the value of land (Ponca land) that the United States inadvertently had conveyed to the Sioux Tribe. *Sioux Tribe of Indians v. United States*, 7 Cl.Ct. 468 (1985); *Sioux Tribe of Indians v. United States*, 7 Cl.Ct. 481 (1985). The Court also denied the Sioux

Tribe's claim that a portion of the Government's expenditures was for peace and not for land. *Sioux Tribe of Indians v. United States*, 6 Cl.Ct. 91 (1984).

In addition to the foregoing holdings, the Court had indicated to the parties in some detail, by way of *dicta*, as to how it would rule on virtually all of the remaining legal issues involving the allowance of offsets. *See* SJ I, 6 Cl.Ct. at 95-96. After the remand by the Federal Circuit in *Cheyenne River Sioux Tribe v. United States*, *supra*, and specifically in order to facilitate stipulation, the Court again reiterated and expanded upon its prior expressions of opinion concerning the allowability of offsets. *See* Transcript of Proceedings before the Court on March 5, 1987, at 27-32. Counsel, therefore, had clear-cut legal guidelines from the Court as to all outstanding legal issues when they first approached the subject of a fact stipulation. Also, it was this status conference which Mr. Joe American Horse, the current president of the Oglala Sioux Tribe, and several other representatives of the other reservation tribes, attended. The movants were clearly made aware of the Federal Circuit's decision and suggestions in this matter, as well as this Court's views regarding the same. Knowing this information, they still took no action until after the judgment had been entered by this Court.

The Stipulation of Facts actually entered into by the Sioux Tribe, through its attorney(s) of record, and the United States was made expressly "subject to the approval of the Court." In order to become effective, the stipulation further required that the Court determine that the categories of offsets set forth in the stipulation were allowable as a matter of law. *See* paragraph 9 of the Stipulation of Facts, *supra*. The stipulation thus provided, in substance, that *if* the Court determined the listed categories of offsets to be allowable as a matter of law, then the dollar amounts of those offsets were agreed upon by the parties to total $3,703,892.98 as a

matter of fact.[4] Moreover, if the Court did not rule on the legal issues consistent with its prior opinions, the Stipulaton of Facts would be "null and void." Stip. ¶ 11, *supra*.

The Stipulation of Facts shows on its face that the role of counsel was limited to allocating dollar amounts to defined categories of offsets allowed by the Court. Indeed, counsel's role was even more circumscribed than it superficially appears. Out of $3,703,892.98 in agreed offsets, $2,669,762.20 had already been determined by the Court to be a proper deduction. *See* SJ II, *supra*, 7 Cl. Ct. at 492. The remaining $1,034,130.78 in offsets, which were the true subject of the stipulation, represent about two percent of the liability award, a relatively insubstantial figure, and only approximately one quarter of the offset amount that was actually agreed to by the parties.

Counsel, of course, did not stipulate to the offsets in a vacuum. The Government's expenditures were shown in the Government's multi-volume GAO accounting report and had been classified by the Sioux Tribe's accountant, Mr. Paul Gillis, who has served as an expert witness in a number of cases before the Commission and this Court. The stipulated figures, insofar as they reasonably could be ascertained, did not include any money which was not allowable as an offset under the rulings of the Court.

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[4] Stip., ¶¶ 8, 11, *supra*. As the attorney of record for the Sioux Tribe pointed out to the Court: "[W]hat the stipulation does, is assume that Your Honor will find, as a matter of law, that which you indicated in your comments from the bench and in your prior opinion, you believed to be the law in this case. Assuming that is your ruling, here are the offsets that the parties have agreed to and we will have agreed to all of them." Transcript of Proceedings before the Claims Court on June 8, 1987, at 4; *see also* remarks of Edward Passarelli, Government counsel (*id.* at 9) and Joint Status Report of June 3, 1987.

Significantly, the movants have not challenged the amounts stipulated to by the parties in offsets, *i.e.*, $1,034,130.78.

Given these circumstances and the advanced status of the case, as described above, counsel's agreement that $1,034,130.78 represented the dollar amount of disputed offsets was exactly the type of determination (*i.e.*, analysis of the evidence) that attorneys can undertake "as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients." *Cheyenne River Sioux Tribe v. United States*, *supra*, 806 F.2d at 1053. *See Lipp v. National Screen Service Corp.*, 290 F.2d 321, 322 (3d Cir.), *cert. denied*, 368 U.S. 385, 82 S.Ct. 61, 7 L.Ed.2d 36 (1961) ("There is no doubt in our minds that this arrangement to expedite this litigation to final conclusion was well within the authority of the lawyers who participated."); *United States v. Texas*, 523 F.Supp. 703, 711 (E.D.Tex.1981) ("The entering into evidentiary stipulations, before or during trial, falls squarely within an attorney's sphere of authorized conduct."); *Gottwals v. Rencher*, 60 Nev. 35, 98 P.2d 481, 484 (1940) ("Stipulations by respective counsel as to evidence to take the place of formal proof have always been common practice.").

The Stipulation of Facts in this case led to the entry of a final judgment by the Court. This result followed not because judgment was entered upon the stipulation, but rather because, after the Court's ruling as to the offsets allowable as a matter of law and the Court's subsequent approval of the agreed offset amounts, no issue remained in the case to litigate. It would be bizarre indeed if the Court were to allow this case to remain open and on its docket when nothing more needed to be resolved. Thus, the Stipulation of Facts did no more than eliminate the need for trial on a finite, easily resolvable factual question—the dollar amount of described Government expenditures—and in no way effected a compromise or settlement of the overall 1868 Treaty claim.

In short, in the overall context of this incredibly complex and long-standing case, the Stipulation of Facts played a minor part. It was this Court that entered the judgment after it was convinced that the $1,034,130.78 that the parties had stipulated to in good faith was appropriate as a matter of law and fact. It can in no way be considered to be a settlement agreement entered into without authority, under the circumstances present here.

The second matter for discussion relates to the timeliness of the movant tribes' motion. In their motion, the movants have alleged that the attorney(s) of record for the plaintiff tribe were not authorized to represent them in this litigation, and thus they were not authorized to enter into the Stipulation of Facts with the Government in this case. The movants have attached affidavits to their motion which indicate that the two tribes did not renew their attorney contracts with the attorney(s) of record in this case when they expired in the early 1980's. They also attach several resolutions passed during the early and middle 1980's by the movant tribes' governing bodies, which indicated that the two tribes wished to recover their ancestral land and that they did not wish the attorney(s) of record to act in any way contrary to this desire.

The problem with this information, however, is not that it did not exist; the problem is that the two movant parties did not act on this information in an appropriate or timely manner consistent with the Rules of this Court. They neither moved to substitute new attorneys nor moved to dismiss this action. The real question thus becomes, where were the movant parties for the 37 long years that this case has been in hotly contested litigation?

From the beginning of this case 37 years ago until the entry of judgment, the eight Sioux tribal representatives, including the movants, acted together thorugh

the attorney of record and his predecessor counsel, in the prosecution of the 1868 Treaty claim before the Indian Claims Commission, the Court of Claims, and ultimately this Court. At no time during any proceedings at the trial court level did either movant party seek separate legal representation, or raise any new and different legal or factual issues, or in any other way take an independent legal position.

Indeed, for seven years preceding the judgment of July 30, 1987, the Oglala Sioux Tribe had an open invitation from this Court to substitute counsel, an invitation which the Tribe rejected. More specifically, in 1980 the attorney of record moved for leave to withdraw as attorney for the Oglala Sioux Tribe in this case for the reasons stated in the motion. (Motion filed September 17, 1980.) The Oglala Sioux Tribe never responded. The Court thereafter denied the motion, "although supported by good cause," with the right to renew "at such time that the Oglala Sioux Tribe seeks by appropriate motion to make a proper substitution of counsel." (Order filed October 9, 1980.) Mr. Joe American Horse, the vice president (now president) of the Tribe, upon receipt of the order, wrote personally to this Court by letter dated October 27, 1980. *See* Appendix A, attached without enclosures. The Court answered by letter dated December 2, 1980, advising the vice president in pertinent part:

> Please be advised that the effect of my order of October 9, 1980 regarding Mr. Lazarus' motion for leave to withdraw as counsel for the Oglala Sioux Tribe was that Mr. Lazarus would not be allowed to withdraw as the Oglala Sioux Tribe's counsel until such time as the Oglala Sioux Tribe filed an appropriate substitution of attorney motion with this Court pursuant to Rule 203(c). In short, if the Oglala Sioux Tribe wishes to change their attorney in this litigation, they must take affirmative action by filing with me a motion for substitution of attor-

> ney. Until the Oglala Sioux Tribe takes that step, Mr. Lazarus will remain to protect the interests of the Oglala Sioux Tribe as its counsel.

See Appendix B attached. Prior to the judgment being issued in this case, the Oglala Sioux Tribe had never moved to substitute counsel in this case.[5]

In 1985, on the same day that the Oglala Sioux Tribe and the Cheyenne River Sioux Tribe filed appeals from this Court's entry of judgment for $39,749,700, *Sioux Tribe of Indians v. United States*, 8 Cl.Ct. 80 (1985), the attorney of record (Mr. Lazarus) again moved for leave to temporarily withdraw as counsel for the two tribes, pending resolution of the appeals. (Motion filed April 23, 1985.) Again the Oglala Sioux Tribe ignored the motion. Again the Court denied the motion without prejudice. (Order filed April 24, 1985.)

The salient point is that neither movant party has ever asked this Court to substitute new counsel, or sought to enter a separate appearance, or otherwise attempted to assert through legal process a position independent of the Sioux Tribe and of the six other Sioux reservation tribes in these proceedings.[6] It is too late in the game to do this now. Having failed over a 37-year period to raise any substantive objection to what was happening, the Oglala Sioux Tribe and the Rosebud Sioux Tribe now are precluded and estopped from initiating their belated attack upon the judgment of this Court, an attack in which the Sioux Tribe and the six other Sioux tribal representatives do not join.[7] As the Court of Claims ob-

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[5] Until the entry of judgment, the Rosebud Sioux Tribe also had never expressed the slightest dissatisfaction with the conduct of this litigation by counsel—in this Court or in the appellate courts. Accordingly, no question about the attorney(s) of record's continuing authority to represent that tribe ever arose.

[6] On November 2, 1987, the movant parties finally filed a motion with this Court to change their attorney of record.

[7] Although the plaintiff's attorney of record (and the Government) asserts that the movants lack standing to even raise these

served in a different context, but when faced with a substantial change in litigation strategy by the tribal plaintiff "after 25 years," that course "when the goal of final adjudication is in sight cannot be." *Temoak Band of Western Shoshone Indians v. United States*, 219 Ct.Cl. 346, 354, 593 F.2d 994, 998, *cert. denied*, 444 U.S. 973, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). *See also Western Shoshone v. United States*, 209 Ct.Cl. 43, 531 F.2d 495, *cert. denied*, 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976). These two *Western Shoshone* cases stand for the proposition that litigants cannot be a party to a massively litigated case for a long period of time, and then file motions at the last possible moment that would entirely change the litigation focus of the case. It simply will not be allowed for all of the reasons discussed in those two cases. The movant parties do not prevail on their lack of authority arguments here.

The third and last matter that should be addressed is the plaintiff counsel's argument that the movants are not aggrieved by the money judgment in this case. Counsel points to the fact that six of the eight reservation tribes have not joined the movants in their motion, which presumably can be read to mean that they are satisfied with the amount and adequacy of the money judgment. Also, counsel points to the fact that nowhere in the motion is there any hint that the movants themselves are dissatisfied with the amount of the money judgment. The real motivation for the motion, counsel claims, is that the movants do not want this long-lived dispute to come to a conclusion. The movants want this case to stay open as a bargaining chip so that they may convince the Congress at some future point in time to return some or all of their ancestral land.

Indeed, the plaintiff's counsel is quite correct in this assertion. The movants simply want their ancestral land

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issues with the Court, the Court chooses to address the merits of the movants' arguments and finds them inadequate for the reasons discussed herein.

returned. Hence, in their motion, they allege that "substantial legal, moral and political interests of the tribes would be harmed if the judgment is not vacated." Memorandum in Support of O/R Motion at 2.

In 1950, when this action was commenced, all eight reservation tribes brought suit under the authority of the Indian Claims Commission Act to recover a money judgment on behalf of the land-owning, treaty-signing Sioux Tribe of Indians. There was no hint that they brought suit seeking a return of their land, nor for that matter, was there any authority under which they could sue for the return of their land under the Act. For 37 years, the case went forward with the only possibility being a money judgment to compensate the Sioux Indians for their inadequate compensation accorded them in the 1868 Treaty. It is simply too late to change horses now. This Court will not allow this case to be kept open and held hostage while the movant reservation tribes pursue their pipe dream of negotiating a return of their land. Even after a money judgment is ordered, of course, the movant tribes will remain free to pursue this goal.

It is not for this Court to say whether the Congress of the United States will ever decide to return some or all of the Sioux land. It is, however, up to this Court to say that this case has come to an end. The attorney(s) of record in this have litigated this matter with uncommon skill and devotion to their clients and the result has been beneficial to them. They have not been aggrieved by the judgment. This being the case, the motion for relief from the judgment is hereby denied. The judgment, as issued on July 30, 1987, will stand.

CONCLUSION

For the reasons discussed above, the movants' motion for relief from the judgment under USCC Rule 60(b) is hereby denied.

Each party to bear its own costs.

APPENDIX A

OGLALA SIOUX TRIBE
Phone (605) 867-5821
Box 468
Pine Ridge, South Dakota 57770

October 27, 1980

Honorable Robert J. Yock
Trial Judge
U.S. Court of Claims
Washington, D.C.

RE: Docket No. 74 (Black Hills case)

Dear Judge Yock:

I am in receipt of a letter dated October 14, 1980 with an attached order entitled "Trial Judge's Order to Motion for Leave to Withdraw as Counsel for Oglala Sioux Tribe" filed by you and signed on October 9, 1980.

The position of the Oglala Sioux Tribe is as stated in Executive Board Resolution No. 80-51XB, a copy of which is enclosed for your information. Mr. Lazarus is well aware of this position since hi-firm routinely obtains copies of all minutes and resolutions of the Oglala Tribal Council and the Executive Committee.

Please file a copy of this correspondence in the official court file of the above-named case.

Sincerely,

/s/ Joe American Horse
JOE AMERICAN HORSE
Vice-President

Enclosure

cc: U.S. Attorney General
Arthur Lazarus
Marvin J. Sonosky
William H. Payne
Clarence Skye

APPENDIX B

Trial Division

UNITED STATES COURT OF CLAIMS
717 Madison Place, N.W.
Washington, D.C. 20005

December 2, 1980

Mr. Joe American Horse
Vice-President
Oglala Sioux Tribe
Box 468
Pine Ridge, South Dakota 57770

Re: The Sioux Tribe of Indians, et al. v. United States No. 74 (Fort Laramie Treaty Lands)

Dear Mr. American Horse:

The undersigned trial judge is in receipt of your letter of October 27, 1980, in which you have attached Resolution No. 80-51XB, and have stated your belief that Mr. Lazarus is aware of this position as it pertains to this case, Docket No. 74.

Please be advised that the effect of my order of October 9, 1980 regarding Mr. Lazarus' motion for leave to withdraw as counsel for the Oglala Sioux Tribe was that Mr. Lazarus would not be allowed to withdraw as the Oglala Sioux Tribe's counsel until such time as the Oglala Sioux Tribe filed an appropriate substitution of attorney motion with this Court pursuant to Rule 203(c). In short, if the Oglala Sioux Tribe wishes to change their attorney in this litigation, they must take affirmative action by filing with me a motion for substitution of attorney. Until the Oglala Sioux Tribe takes that step, Mr. Lazarus

will remain to protect the interests of the Oglala Sioux Tribe as its counsel.

Sincerely,

/s/ Robert J. Yock
ROBERT J. YOCK
Trial Judge

cc: Arthur Lazarus, Esq.
Marvin Sonosky, Esq.
Craig A. Decker, Esq.
Mr. Stanley Looking Elk, President
Ms. Bernadine Blue Bird, Secretary

IN THE UNITED STATES CLAIMS COURT

No. 74

THE SIOUX TRIBE OF INDIANS

v.

THE UNITED STATES

JUDGMENT

Pursuant to the joint motion for entry of judgment filed on July 29, 1987, and court's approval of said motion on July 30, 1987,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the sum of $43,949,700 less stipulated offsets of $3,703,892.98 for a net amount of $40,245,807.02.

Frank T. Peartree
Clerk of Court

By: /s/ Linde A. Eddins
Deputy Clerk

July 30, 1987

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Effective May 1, 1987, RUSCC 77(k)(2) is amended to read:

"Filing Notice of Appeal .... $105.00 (includes $5.00 fee for notice of appeal and $100.00 Court of Appeals filing fee)".

IN THE UNITED STATES CLAIMS COURT

Docket No. 74

THE SIOUX TRIBE OF INDIANS,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

JOINT MOTION FOR ENTRY OF JUDGMENT

[Filed July 29, 1987]

The parties hereby submit as Exhibit "1" a Stipulation of Facts regarding the offsets of the government in this case. The parties move the Court to approve the Stipulation of Facts and to enter judgment in accordance with the Stipulation of Facts in the amount of $40,245,807.02 which represents the gross award of $43,949,700 less stipulated offsets of $3,703,892.98. The parties also submit a Proposed Order, Exh. "2" and a Proposed Judgment, Exh. "3".

Dated this 29th day of July, 1987.

Respectfully submitted,

For the Plaintiffs:

/s/ Arthur Lazarus, Jr.
ARTHUR LAZARUS, JR., P.C.
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1001 Pennsylvania Avenue, N.W.
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Of Counsel:

MARVIN J. SONOSKY, ESQUIRE
WILLIAM HOWARD PAYNE, ESQUIRE

For the Defendant:

/s/ Edward J. Passarelli
EDWARD J. PASSARELLI
Attorney for Defendant
U.S. Department of Justice
Land and Natural Resources Division
Benjamin Franklin Station
P.O. Box 663
Washington, D.C. 20044
(202) 633-2794

APPROVED and the Clerk is directed to enter judgment accordingly. /s/ Yock July 30, 1987

EXHIBIT 1

IN THE UNITED STATES CLAIMS COURT

Docket No. 74

THE SIOUX TRIBE OF INDIANS,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

STIPULATION OF FACTS

The parties to this action, through their respective counsel, stipulate as follows, subject to the approval of the Court:

1. The Indian Claims Commission entered an award of $43,949,700 in favor of the Sioux Nation, and initially denied all offsets. *Sioux Tribe v. United States*, 42 Ind. Cl. Comm. 214 (1978) and 42 Ind. Cl. Comm. 257 (1978). The government appealed on the issue of offsets.

2. On appeal, the Court of Claims reversed the Indian Claims Commission's denial of offsets and remanded the case for trial to determine the merits of the defendant's claim for offsets based on both alleged payments on the claim and gratuitous offsets. *United States v. Sioux Tribe*, 222 Ct. Cl. 421, 616 F.2d 485 (1980).

3. On remand, the Claims Court ruled that the defendant was not entitled to deduct any gratuitous offsets and that the defendant was entitled to deduct $2,669,762.20, representing the value of land that the United States inadvertently conveyed to the Sioux Nation. *Sioux Tribe of*

Indians v. United States, 7 Cl. Ct. 468 (1985); *Sioux Tribe of Indians v. United States*, 7 Cl. Ct. 481 (1985). The Claims Court also denied the Sioux Nation's claim that a portion of the government's expenditures was for peace and not for land. *Sioux Tribe of Indians v. United States*, 6 Cl. Ct. 91 (1984).

4. Thereafter, without further trial, the Claims Court entered a final judgment for $39,749,700, the amount of a settlement never accepted by the Sioux. *Sioux Tribe of Indians v. United States*, 8 Cl. Ct. 80 (1985).

5. On appeal, the Federal Circuit Court of Appeals reversed and, in so doing, suggested that the "parties may be able to stipulate the total dollar amount of various categories of offsets to which the government is entitled. If the parties can so stipulate, this may be action that counsel for the Sioux Tribe can take as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients." *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046, 1053 (Fed. Cir. 1986).

6. This stipulation is made pursuant to the suggestion of the Federal Circuit Court of Appeals. *See*, also transcript of proceedings before the Claims Court on March 5, 1987, at pp. 32, 35-36.

7. The Claims Court has indicated to the parties, clearly and in some detail, as to how it will rule on the remaining legal issues involving allowance of offsets. *See* 6 Cl. Ct. at 95-96; transcript of proceedings on March 5, 1987, at pp. 27-32.

8. Based upon the holdings of the Court, as set forth in paragraph 3, and the Court's further views about the applicable law, as set forth in paragraph 7, plaintiff and defendant stipulate that the United States is entitled to the following offsets on the Sioux 1868 Treaty claim:

$2,669,762.20	Land
$ 408,753.87	Educational expenditures for 20 years
$ 28,572.68	Article 8 Agriculture expenditures for 10 years
$ 415,135.99	Article 10 expenditures exclusive of food, rations or provisions
$ 181,668.24	Article 13 expenditures exclusive of stipulated educational payments that are duplicative
$3,703,892.98	Total Offsets

9. The parties intend that approval of this Stipulation of Facts by the Claims Court shall constitute its determination that the categories of offsets set forth in paragraph 8 are allowable as a matter of law.

10. Upon such approval by the Court, a final judgment may be entered in the sum of $40,245,807.02, which represents the gross award of $43,949,700 less payments on the claim of $3,703,892.98 in favor of the Sioux Tribe of Indians by its representatives, the Sioux Tribe of the Rosebud Indian Reservation, the Sioux Tribe of the Standing Rock Indian Reservation, the Sioux Tribe of the Pine Ridge Indian Reservation, the Sioux Tribe of the Cheyenne River Indian Reservation, the Sioux Tribe of the Crow Creek Indian Reservation, the Sioux Tribe of the Lower Brule Indian Reservation, the Sioux Tribe of the Santee Indian Reservation, and the Sioux Tribe of the Fort Peck Indian Reservation.

11. This Stipulation of Facts shall be null and void unless it is approved by the Claims Court, as provided in paragraph 9, and unless the final judgment entered pursuant to paragraph 10 is based upon the precise figures set forth in paragraph 8. Subject to such approval and entry of final judgment, defendant withdraws without prejudice all offsets asserted in this case which do not constitute expenditures under the 1868 Sioux Treaty.

Respectfully submitted,

For the Plaintiffs:

/s/ Arthur Lazarus, Jr.
ARTHUR LAZARUS, JR., P.C.

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For the Defendant:

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ROGER MARZULLA
Acting Assistant Attorney General

/s/ Edward J. Passarelli
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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1236

THE SIOUX TRIBE OF INDIANS,
Plaintiff-Appellee,

OGLALA SIOUX TRIBE AND ROSEBUD SIOUX TRIBE,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

On Appeal from the United States Claims Court
in Case No(s). 74

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Nov. 23, 1988

Issued as a Mandate: December 14, 1988

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-1236

THE SIOUX TRIBE OF INDIANS,
Plaintiff,

OGLALA SIOUX TRIBE AND ROSEBUD SIOUX TRIBE,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

[Filed Dec. 28, 1988]

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same is declined.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

December 28, 1988

cc: Robert T. Coulter
Arthur Lazarus, Jr.
Jacques B. Gelin

Supreme Court, U.S.
FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE OGLALA SIOUX TRIBE and
THE ROSEBUD SIOUX TRIBE,
Petitioners,

v.

THE UNITED STATES and
THE SIOUX TRIBE OF INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MEMORANDUM IN OPPOSITION OF RESPONDENT SIOUX TRIBE OF INDIANS

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WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

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QUESTION PRESENTED

The only issue before the court below was whether the Claims Court, after its decision on the merits had become final, abused its discretion in a Rule 60(b) proceeding when it held that counsel for the parties did not effect an unauthorized settlement of this Indian claims case by entering into a stipulation of facts as to the amount of various offsets against a prior interlocutory award. The Federal Circuit found no abuse of the trial court's discretion and thus allowed its final judgment to stand.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1380

THE OGLALA SIOUX TRIBE and
THE ROSEBUD SIOUX TRIBE,
Petitioners,

v.

THE UNITED STATES and
THE SIOUX TRIBE OF INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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MEMORANDUM IN OPPOSITION OF RESPONDENT SIOUX TRIBE OF INDIANS

STATEMENT OF THE CASE

This litigation commenced in 1950 with the filing of a petition under the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70 *et seq.*, in the name of the land-owning, treaty-signing Sioux Tribe of Indians ("Sioux Tribe") (Pet. App. 17a-18a). The Sioux Tribe, the owner of the 1868 Treaty claim,[1] has not existed as an

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[1] Under the Treaty of April 29, 1868, 15 Stat. 635, the United States acquired from the Sioux Tribe a substantial area of land for what the Commission ultimately determined was an inadequate consideration. 25 U.S.C. 70a; *Sioux Tribe* v. *United States*, 42 Ind. Cl. Comm. 214, 257 (1978).

entity since 1890, when the United States divided the single Great Sioux Reservation into separate reservations. *See* Act of March 2, 1889, 25 Stat. 888. As permitted by the Claims Act, suit was brought in a representative capacity on behalf of the Sioux Tribe by eight present-day Sioux reservation tribes (Pet. App. 2a, 12a). The suit could have been instituted and maintained by any one of these tribal representatives or, under certain circumstances, even by individual Sioux. 25 U.S.C. 70i; *Yavapai, et al.* v. *United States*, 15 Ind. Cl. Comm. 68, 96 (1965).

The course of the case subsequent to its initial filing, a 37-year history of trials, decisions and appeals,[2] is summarized in the majority opinion of the court below (Pet. App. 2a-4a; *see also*, Pet. App. 18a-26a). By 1980, all questions as to jurisdiction, liability and value had been determined, and the amount of the offsets which the defendant properly could assert against an interlocutory award of $43,949,700 became the only unresolved issue remaining in the case. Pet. App. 8a, 32a; *United States* v. *Sioux Tribe*, 616 F.2d 485, 494 (Ct. Cl. 1980).

On July 30, 1987, the Claims Court, as successor to the Indian Claims Commission, entered a final judgment for $40,245,807.02 in favor of the plaintiff Sioux Tribe

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[2] *See, e.g.: Sioux Tribe* v. *United States*, 500 F.2d 458 (Ct. Cl. 1974); *United States* v. *Sioux Tribe*, 616 F.2d 485 (Ct. Cl. 1980), *cert. denied sub nom., Yankton Sioux Tribe* v. *United States*, 446 U.S. 953 (1980); *Cheyenne River Sioux Tribe* v. *United States*, 806 F.2d 1046 (Fed. Cir. 1986), *cert. denied sub nom., Oglala Sioux Tribe* v. *United States*, —— U.S. ——, 107 S. Ct. 3184 (1987). Before present counsel for the Sioux Tribe entered this case in 1957, the 1868 Treaty claim had been dismissed in its entirety (2 Ind. Cl. Comm. 646 (1954)), and that dismissal had been affirmed on appeal. *Sioux Tribe of Indians* v. *United States*, 146 F. Supp. 229 (Ct. Cl. 1956), judgment vacated by order dated November 5, 1958 (unreported); *see* 182 Ct. Cl. 912 (1968).

(Pet. App. 44a). This judgment was based upon specific rulings by the Claims Court covering the various categories of Government expenditures that constituted allowable offsets as a matter of law and a fact stipulation, upon which counsel for the parties had agreed, covering the Government's actual expenditures in each allowable offset category (Pet. App. 46a-48a).[3] Judgment followed because, after the court's rulings on the law and approval of the fact stipulation, nothing remained in the case to be done (Pet. App. 9a-10a).

On September 28, 1987, two of the eight present-day tribal representatives, the Oglala and Rosebud Sioux Tribes ("petitioners"), filed a motion for relief from judgment under Claims Court Rule 60(b), which alleged that the Sioux Tribe and the United States had entered into an unauthorized settlement. This action, taken two months after the entry of final judgment, constituted the very first separate appearance in the trial court by either petitioner. As the Claims Court expressly found: "From the beginning of this case 37 years ago until the entry of judgment, the eight Sioux tribal representatives, including the movants [petitioners], acted together through the attorney of record and his predecessor counsel, in the prosecution of the 1868 Treaty claim * * *. At no time during any proceedings at the trial court level did either movant party seek separate legal representation, or raise any new and different legal or factual issues, or in any

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[3] The court below, in the hope that this case might thereby progress more speedily, earlier had suggested that

> the parties may be able to stipulate the total dollar amount of various categories of offsets to which the government is entitled. If the parties can so stipulate, this may be action that counsel for the Sioux Tribe can take as part of the normal conduct of litigation without the necessity of obtaining the approval of their clients.

Cheyenne River Sioux Tribe v. *United States*, *supra*, 806 F.2d at 1053.

other way take an independent legal position." Pet. App. 37a.

The Claims Court denied petitioners' Rule 60(b) motion by Memorandum Order issued on December 17, 1987 (Pet. App. 17a-40a). On appeal, the Federal Circuit affirmed, holding that the Claims Court did not abuse its discretion in determining (1) that counsel's agreement as to the dollar amounts of allowable offsets was a fact stipulation executed in the normal course of litigation, not a settlement, and (2) that Sioux counsel had full authority to enter into the fact stipulation (Pet. App. 1a-16a, Opinion of November 23, 1988). The court below further pointed out that, because the case had been brought in a representative capacity, "the elimination of the two appellant tribes as plaintiffs in the suit would not change the judgment in favor of the Sioux Tribe of Indians" (Pet. App. 12a).[4] Finally, on December 28, 1988, the Federal Circuit declined petitioners' suggestion for a rehearing *en banc* (Pet. App. 51a).

REASONS FOR DENYING THE WRIT

I. The decision below does not involve a significant question of federal law or any "discriminatory new rule."

Petitioners' Rule 60(b) motion consisted primarily of an argument that the fact stipulation with respect to offsets entered into by counsel for the Sioux Tribe and the United States really was a settlement which required tribal consent. For the reasons given at length in its Memorandum Order (Pet. App. 31a-36a), and summarized with approval in Judge Friedman's opinion for the court below (Pet. App. 8a-10a), the Claims Court concluded that the fact stipulation was executed "as part of the normal conduct of litigation" and could "in no way be considered to be a settlement agreement. . . ."

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[4] In like vein, the Claims Court had observed that petitioners are not aggrieved by the judgment (Pet. App. 39a-40a).

(Pet. App. 31a, 36a).[5] This holding not only was correct, but, of course, also reflected the particular circumstances of this case. That portion of the decision below which affirmed the Claims Court's holding, therefore, plainly raises no question of sufficient importance to warrant exercise of this Court's certiorari jurisdiction.

The Federal Circuit's determination that Sioux counsel was authorized to execute the fact stipulation is equally case-specific and devoid of general significance. Faced with this juridical hurdle, petitioners here argue that the lower courts have allowed an attorney "to usurp the right of Indian tribes to control their legal claims" (Pet. 11)—conduct that would not be permitted counsel for any other class of litigants. As is shown below, the facts belie this claim of discriminatory treatment.

First, the record as to which Sioux tribe assumed what legal position in this case needs clarification. Briefly stated, all eight representative Sioux tribes employed counsel in 1957 to prosecute the 1868 Treaty claim under contracts approved by the Secretary of the Interior (Pet. App. 11a).[6] Although some of the tribes allowed their contracts to lapse after 20-30 years, at no time prior to final judgment did any of these tribes, including petitioners, move for leave to substitute counsel, as permitted under Claims Court Rule 81(d), or in any other way seek in court to change the conduct of the litigation (Pet. App. 11a; Pet. App. 28a, 37a). Moreover, to this day,

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[5] After a detailed analysis of its three offset opinions and the matters upon which counsel actually had agreed, the Claims Court determined that "the Stipulation of Facts did no more than eliminate the need for trial on a finite, easily resolvable factual question —the dollar amount of described Government expenditures. . . ." Pet. App. 35a.

[6] Ironically, counsel was hired to resuscitate the then moribund 1868 Treaty claim (*see* p. 2, n.2, *supra*). Now, after 30 years of litigating this matter "with uncommon skill and devotion to [his] clients" (Pet. App. 40a), he is faulted by petitioners for winning it.

six of the eight reservation tribes have not joined with petitioners, which certainly indicates that "they are satisfied with the amount and adequacy of the money judgment" (Pet. App. 39a).

The only tribe which may be said actively to have expressed a concern pre-judgment about the continued prosecution of this case is petitioner Oglala Sioux Tribe ("Oglala").[7] Oglala's various council resolutions calling for dismissal of the 1868 Treaty claim,[8] however, were literally impossible to implement given the contrary litigating posture of the other Sioux tribes. Moreover, rather than follow standard judicial procedures available to all litigants seeking relief, Oglala wholly failed to communicate its views to the court "in an appropriate or timely manner" (Pet. App. 36a). Indeed, in contrast to its claim of discrimination, Oglala's record of deliberate silence before the trial court is consistent and indisputable:

1. In 1980, for example, Sioux counsel moved for leave to withdraw as attorney for the Oglala (Pet. App. 10a; Pet. App. 37a). The tribe ignored that motion. The Court of Claims (Trial Division) denied the motion without prejudice, but stated that the "motion may be renewed, however, at such time that the Oglala Sioux Tribe

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[7] Although not a single act to such effect is mentioned, petitioners contend nonetheless that the Rosebud Sioux Tribe "took many steps to extricate [itself] from these proceedings" (Pet. 6). This statement is not accurate. As the Claims Court pointed out: "Until the entry of judgment, the Rosebud Sioux Tribe also had never expressed the slightest dissatisfaction with the conduct of this litigation by counsel—in this Court or in the appellate courts" (Pet. App. 38a, n.5).

[8] In Resolution No. 83-160, printed in the Joint Appendix before the Federal Circuit at 122, for example, Oglala expressed its "official position that Docket 74 [the 1868 Treaty claim] be withdrawn from the Court of Claims. . . ." That resolution is mischaracterized by petitioners (Pet. 9-10) and in the dissent below (Pet. App. 15a) as calling only for dismissal of Oglala from the case.

seeks by appropriate motion to make a proper substitution of counsel" (Pet. App. 10a). The tribe ignored that order and a subsequent letter to the same effect from the trial judge (Pet. App. 37a-38a; Pet. App. 42a-43a).

2. In 1983, Oglala was given clear notice that unilateral action in permitting its attorney's contract to lapse and in adopting a resolution favoring land restoration over a money judgment did not constitute an effective withdrawal from litigation. *Oglala Sioux Tribe* v. *Homestake Min. Co.*, 722 F.2d 1407, 1413, n.6 (8th Cir. 1983). The tribe still did nothing in this case.

3. In 1985, Sioux counsel moved for leave temporarily to withdraw as the attorney for Oglala (Pet. App. 10a; Pet. App. 38a). The tribe again ignored the motion. The Claims Court again denied the motion without prejudice "because the case 'requires that competent, experienced and knowledgeable counsel remain as attorney of record, until there has been an appropriate . . . substitution of counsel' " (Pet. App. 10a; Pet. App. 38a). Oglala again ignored the court's order.[9]

4. At a status conference held on March 5, 1987, and attended by Sioux tribal representatives, including the Oglala president, the Claims Court encouraged counsel

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[9] As an excuse for Oglala's inaction, petitioners allege that the tribe was too poor to hire an attorney for the purpose of filing a notice of appearance and a follow-on motion for voluntary dismissal (Pet. 9, 15). Both lower courts knew this contention to be untrue. During the entire period in question, Oglala was conducting an active litigation program, including a petition for a writ of certiorari in this case, through paid counsel. *See, e.g.: Cheyenne River Sioux Tribe* v. *United States*, 806 F.2d 1046 (Fed. Cir. 1986), *cert. denied sub nom., Oglala Sioux Tribe* v. *United States*, —— U.S. ——, 107 S. Ct. 3184 (1987); *Oglala Sioux Tribe* v. *State of South Dakota*, 770 F.2d 730 (8th Cir. 1985), *cert. denied* 475 U.S. 1091 (1986); *Oglala Sioux Tribe* v. *Homestake Min. Co., supra*; *Oglala Sioux Tribe* v. *Hallett*, 708 F.2d 326 (8th Cir. 1983); *Oglala Sioux Tribe* v. *United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied* 455 U.S. 907 (1982).

to enter into a fact stipulation as to offsets in order to bring the case to a close, as previously suggested by the Federal Circuit in an appeal to which Oglala was a party. Pet. App. 24a-25a, 33a; *Cheyenne River Sioux Tribe* v. *United States, supra.* Oglala still did nothing in court before entry of final judgment on July 30, 1987. Finally, on September 28, 1987, petitioners filed their Rule 60(b) motion and two months later moved to change their attorney (Pet. App. 10a).

Based upon the foregoing record, the Claims Court ruled that petitioners' attempt to reverse direction in this case came "too late" (Pet. App. 38a). On appeal, the Federal Circuit concluded that, far from abusing its discretion,

> [t]he Claims Court was fully justified in refusing to terminate the authority of the attorneys who had been handling this complex litigation for 30 years and were at the point of successfully completing it, unless and until the appellant tribes moved to substitute new counsel * * *.

Pet. App. 11a. In so holding, the court below applied to petitioners exactly the same rules that govern the conduct of every other litigant, not a new rule sanctioning special treatment for Indian tribes.[10]

Throughout this litigation petitioners had an unquestioned right to change their counsel, but they failed to exercise it. The decision below holding petitioners accountable for that specific inactivity does not vest attorneys generally with control over Indian claims or frustrate any federal policy of tribal self-determination. That factually-based, non-discriminatory decision also presents no legal issue worthy of this Court's review.

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[10] As the Third Circuit recently made clear, if parties to a lawsuit fail to move for a change of attorneys in compliance with applicable court rules, existing counsel may be required to continue their representation even after discharge. *Ohntrup* v. *Firearms Center Incorporated,* 802 F.2d 676 (3rd Cir. 1986).

II. The decision below does not conflict with a decision of this Court or any other court of appeals.

Petitioners argue that the decision below conflicts with many opinions holding that attorneys may not settle cases without their clients' consent (Pet. 13-15). The short answer, as the Federal Circuit concluded, is that the fact stipulation as to offset amounts into which counsel entered in this case was not a settlement (Pet. App. 8a-10a). The rule is well-established that stipulating as to evidentiary matters is exactly the type of activity attorneys can undertake "as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients." *Cheyenne River Sioux Tribe* v. *United States*, *supra*, 806 F.2d at 1053; *see Lipp* v. *National Screen Serv. Corp.*, 290 F.2d 321, 322 (3rd Cir. 1961); *Christy* v. *Atchison, T & S. F. Ry. Co.*, 233 Fed. 255, 257 (8th Cir. 1916) (A stipulation by counsel "as to the existence of relevant facts entered into without fraud, mistake, or collusion, but in good faith, to save expense, and to facilitate the trial of the case" is valid and binding, even though "it resulted in a judgment. . . .").

Petitioners also complain that the court below did not discuss their argument that federal statutes require attorneys for Indian tribes to have federally-approved contracts in effect at all times (Pet. 9, 11, 13). The Federal Circuit, however, did not need to reach that issue. Sioux counsel always had currently effective contracts with a number of the reservation tribes, as petitioners concede (Pet. 7), and, in a representative suit, one would have been sufficient (*see* p. 2, *supra*).

Finally, as previously noted (p. 4, *supra*), the court below held that, since this suit was filed for the Sioux Tribe of Indians by eight modern reservation tribes in a representative capacity, the elimination of petitioners from the case would not change the judgment in favor of the Sioux Tribe (Pet. App. 12a). That ruling dovetails with the conclusion of the Eighth Circuit in related litigation. *Oglala Sioux Tribe* v. *Homestake Min.*

Co., supra, 722 F.2d at 1414 ("Even if the Oglala Sioux had obtained an order dismissing them from the Commission proceedings . . . [the tribe] would be collaterally estopped by the final judgment . . . because the Oglala Sioux are in privity with the Sioux Nation.").

In short, rather than present a conflict, the decision below is wholly consistent with the decisions of other Circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 88-1380

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE OGLALA SIOUX TRIBE AND
THE ROSEBUD SIOUX TRIBE, PETITIONERS

v.

THE UNITED STATES AND
THE SIOUX TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that counsel for the Sioux Tribe of Indians properly entered into a factual stipulation with government counsel concerning the amount of certain offsets to the Sioux's damage award, or whether that stipulation was instead a settlement agreement that the various Sioux Tribes had to ratify.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 862 F.2d 275. The opinion of the Claims Court (Pet. App. 17a-40a) is reported at 14 Cl. Ct. 94.

JURISDICTION

The judgment of the court of appeals (Pet. App. 50a) was entered on November 23, 1988. A rehearing petition was denied on December 28, 1988 (Pet. App. 51a). The petition for a writ of certiorari was filed on February 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1950, Sioux Indians filed a claim with the Indian Claims Commission seeking compensation for the lands in North and South Dakota, Nebraska, Wyoming, and Montana that the United States acquired pursuant to an 1868 treaty. The claim was filed in the name of the Sioux Tribe of Indians, which has not existed as an entity since 1890, as the representative of the eight present-day Sioux tribes, each of which has its own reservation. The Commission concluded in 1978 that the land was worth more than $45 million at the time it was ceded to the federal government and that the government's payment to the tribe had therefore been deficient by nearly $44 million. The Commission completely rejected the government's claims for offsets, which totalled $65 million. It accordingly ordered the government to pay the Sioux $43,940,700. *Sioux Tribe* v. *United States*, 42 Indian Cl. Comm'n 214 (1978). The Court of Claims sustained the Commission's evaluation of the lands, but remanded the case to its trial division for a determination of the government's claims for offsets. *United States* v. *Sioux Tribe*, 616 F.2d 485, cert. denied, 446 U.S. 953 (1980).

On remand, the Tribe's attorney, Arthur Lazarus, moved for leave to withdraw as counsel of record for the Oglala Sioux Tribe, one of the two petitioners here, because that tribe had advised him that it no longer wanted a money judgment, but instead wanted its ancestral homelands returned to it. After Joe American Horse, the Oglala tribe's vice-president, contacted the trial judge concerning the motion (Pet. App. 41a), the judge wrote to American Horse in December 1980 explaining that "if the Oglala Sioux Tribe wishes to change their attorney in this litigation, they must take affirmative action by filing with me a motion for substitution of attorney."

Id. at 42a-43a. The Oglala tribe did not do so, and the court accordingly denied the motion without prejudice. *Id.* at 37a.

Proceedings then continued in the Claims Court. It issued a series of decisions concerning the offsets, including a decision generally limiting the government's offset claims to expenditures for agricultural and educational assistance made in the late 1800s and a decision allowing the government to offset $2.7 million on account of federal land known as the Ponca land that was inadvertently incorporated into a reservation. *Sioux Tribe* v. *United States*, 7 Cl. Ct. 481 (1985). Although relatively little remained to be decided by 1985, the parties were unable to settle because the Oglala tribe and some of the other tribes refused to accept any settlement that did not provide for the return of their ancestral homelands. Pet. App. 22a. Because of the impasse, the trial court in 1985 took the unusual step of entering judgment against the United States in the amount of $39,749,700, the amount of its latest unaccepted offer, without giving notice to the parties or receiving briefs on the propriety of its action. See *ibid.*

After two of the eight tribes (the Oglala and Cheyenne River tribes) decided to appeal, Lazarus moved for leave to withdraw as their counsel. The motion was denied without prejudice after the two tribes failed to respond to it. The Federal Circuit then reversed the Claims Court's decision. *Cheyenne River Sioux Tribe* v. *United States*, 806 F.2d 1046 (1986), cert. denied, 482 U.S. 913 (1987). "Unless a case is settled with the consent of the parties," the court stated, "the duty of the court is to determine the merits and enter judgment accordingly. Where, as here, the court adopts a settlement as its judgment without consideration of the relevant evidence * * *, the court has failed to perform its obligations to determine the case on

the basis of the evidence." 806 F.2d at 1050. The court added that a trial, which would require "the introduction into evidence of vast quantities of details and minute records going back for more than a century," might not be needed on remand. *Id.* at 1053. Instead, the court suggested, "the parties may be able to stipulate the total dollar amount of various categories of offset to which the government is entitled." *Ibid.*

On remand, the parties did just that. In March 1987, a status conference was held at which representatives of the eight tribes, including American Horse, who had become president of the Oglala tribe, were advised of the court of appeals' decision. Government counsel and Lazarus then entered into a stipulation concerning the outstanding factual issues with respect to the government's claimed offsets. The stipulation "provided, in substance, that *if* the Court determined the listed categories of offsets to be allowable as a matter of law, then the dollar amounts of those offsets were agreed upon by the parties to total $3,703,892.98 as a matter of fact." Pet. App. 33a-34a. The court, which had previously ruled that $2.7 million of the claimed offsets were allowable as recovery for the Ponca land, then ruled that the additional $1 million in offsets were allowable as a matter of law as well. *Id.* at 35a. It accordingly entered judgment for $40,245,807.02 in July 1987. *Id.* at 5a.

2. Two months later, petitioners, the Oglala and Rosebud tribes, filed a motion for relief from judgment under Claims Court Rule 60(b), which parallels Rule 60(b) of the Federal Rules of Civil Procedure. The two tribes contended that the stipulation of facts that Lazarus had entered into was really a settlement that he was not authorized to accept. The six other tribes did not join the motion.

The Claims Court denied the motion. Pet. App. 17a-40a. It first concluded that the stipulation of facts was not a settlement agreement. Rather, the court explained, the stipulation merely eliminated the need for a trial of factual questions regarding the amount of the offsets that would be allowed for the government's educational and agricultural assistance to the Sioux in the late 1800s if the court determined that the offsets were permissible as a legal matter. *Id.* at 35a. The court further concluded that counsel for the Sioux had authority to enter into the stipulation because, while Lazarus had twice moved to withdraw as counsel, neither tribe had retained separate counsel in response. The court concluded that "[i]t is too late in the game to do this now." *Id.* at 38a.

3. A divided court of appeals affirmed. Pet. App. 1a-16a. Noting that the decision whether to grant a motion for relief from judgment is discretionary, the court concluded that "[t]he Claims Court did not abuse its discretion in denying the appellant tribes' motion for relief from the judgment awarding the Sioux Tribe of Indians approximately $40 million." *Id.* at 8a.

With respect to petitioners' claim that the stipulation was really a settlement agreement, the court of appeals "agree[d] with the Claims Court that entering into such a stipulation of facts was 'exactly the type of determination (*i.e.*, analysis of the evidence) that attorneys can undertake "as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients." ' 14 Cl. Ct. at 103 (citing *Cheyenne River Sioux Tribe*, 806 F.2d at 1053). *See Lipp* v. *National Screen Serv. Corp.*, 290 F.2d 321, 322 (3d Cir.), *cert. denied,* 368 U.S. 835 [1961]." Pet. App. 9a. The court noted that counsel had also entered into a joint motion for entry of judgment, and held that that circumstance did not transform the stipulation of facts into a settlement agreement. *Id.* at 10a.

The court also agreed that "counsel of record for the Sioux Tribe of Indians had authority to enter into the Stipulation of Facts." Pet. App. 10a. The court noted that Lazarus's contracts with the two tribes had lapsed by the early 1980s, but also noted that his motions to withdraw as their counsel had been ignored by the tribes. *Id.* at 10a-11a. The court added that "for more than 30 years counsel vigorously and effectively pressed this case on behalf of the Sioux Indians." *Id.* at 10a. It concluded: "We agree with the Claims Court that in these circumstances, the appellant tribes were required to do something more than not renew their attorney's contracts if they wished to terminate their attorneys' authority to represent them. They should affirmatively and formally have advised the attorneys that they were terminating the attorney-client relationship, and then should have promptly moved in the Court of Claims to substitute new counsel to represent them." *Id.* at 11a.

Judge Newman, dissenting, concluded that the stipulation of facts was, in reality, a settlement agreement. In her view, under the facts of this case, including "two resolutions by the Oglala Sioux Tribal Council informing counsel that it no longer sought money damages, but wanted to pursue legal and legislative strategies to gain return of ancestral lands," Lazarus did not have authority to enter into the stipulation. Pet. App. 15a.

ARGUMENT

Contrary to petitioners' contentions (Pet. 11-15), this case presents no issue as to whether counsel may settle a case without a client's authorization. It is agreed that counsel may not do so. Rather, the issue on which the court of appeals divided was whether the stipulation of facts that counsel entered into was, in reality, under the

unique facts of this case, a settlement agreement. In our view, the Claims Court and the court of appeals correctly concluded that the stipulation was not a settlement. The stipulation merely resolved minor questions as to the amounts of certain offsets, which totalled about 2½% of the final judgment. Moreover, the stipulation was effective only if the Claims Court held that the offsets were allowable as a matter of law. In any event, the fact-specific question whether the stipulation of facts here was really a settlement agreement does not warrant review by this Court.

That is particularly so since the two petitioning tribes had many opportunities to retain separate counsel prior to entry of the final judgment, but failed to do so. The history of this litigation shows that after many years of service Lazarus twice moved to withdraw as counsel for the Oglala tribe. Despite a letter from the Claims Court in 1980 specifically advising the tribe that it would have to move to substitute counsel if it did not want to be represented by Lazarus (Pet. App. 42a-43a), the tribe did nothing. After the court of appeals issued its 1987 opinion suggesting that a trial might be avoided if counsel stipulated to certain facts, and the Claims Court held a status conference advising the tribes of that decision, they still did nothing. As the Claims Court stated, "for seven years preceding the judgment of July 30, 1987, the Oglala Sioux Tribe had an open invitation from this Court to substitute counsel, an invitation which the Tribe rejected." *Id.* at 37a. Only after final judgment had been entered did the two tribes that have petitioned retain separate counsel. The Claims Court surely did not abuse its discretion under the facts of this case by concluding that it was too late at that point for them to do so, whether or not their contracts with Lazarus had lapsed. *Ohntrup* v. *Firearms Center, Inc.*, 802 F.2d 676 (3d Cir. 1986) (if parties to a lawsuit

fail to substitute counsel, a court may require existing counsel to continue their representation even after they have been discharged). If the two petitioning tribes did not want Lazarus to represent them, and to engage in ordinary activities on their behalf such as agreeing to factual stipulations, they should have retained separate counsel earlier, as the Claims Court had instructed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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